(18,972.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 321.

ADOLPHUS F. McCLAINE, PLAINTIFF IN ERROR,

vs.

GEORGE C. RANKIN, AS RECEIVER OF THE FIRST NATIONAL BANK OF SOUTH BEND, WASHINGTON.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

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a In the United States Circuit Court of Appeals for the Ninth Circuit.

ADOLPHUS F. MCCLAINE, Plaintiff in Error,
vs.
GEORGE C. RANKIN, Successor to and Substituted for J. Frank Aldrich, as Receiver of the First National Bank of South Bend, Washington, Defendant in Error. } No. 793.

Upon writ of error to the United States circuit court for the district of Washington, western division.

1 In the Circuit Court of the United States for the District of Washington, Western Division, July Term, 1899.

2 Be it remembered, that on the 15th day of August, 1899, there was duly filed in said circuit court of the United States for the district of Washington, western division, a complaint, in words and figures as follows, to wit:

3 In the Circuit Court of the United States for the District of Washington, Western Division.

J. FRANK ALDRICH, as Receiver of the First National Bank of South Bend, Plaintiff,
vs.
ADOLPHUS F. MCCLAINE, Defendant.

Complaint.

Comes now J. Frank Aldrich, as receiver of the First National Bank of South Bend, plaintiff, and complains of Adolphus F. McClaine, defendant, and alleges:

I.

That the said First National Benk of South Bend is now and was at all the times hereinafter mentioned a banking corporation, duly organized and existing under and by virtue of the banking laws of the United States of America, located and formerly doing business at South Bend, in the State of Washington, in the district aforesaid.

II.

That the said First National Bank of South Bend became insolvent, closed its doors and suspended business on the 10th day
4 of August, 1895, and the Comptroller of the Currency of the United States having ascertained and determined that the said bank was insolvent, on the 17th day of August 1895, duly ap-

pointed Joseph G. Heim receiver of said First National Bank of South Bend, and the said Joseph G. Heim qualified and acted as receiver of said bank until he resigned his said office and position, and thereupon the plaintiff was on the 29th day of October, 1898, duly appointed receiver of said First National Bank of South Bend by the Comptroller of the Currency of the United States, and said plaintiff qualified as receiver aforesaid, and is now acting as such under and by virtue of the laws of the United States providing for the appointment of receivers of national banking associations.

III.

That on the 17th day of August, 1896, the deputy and acting Comptroller of the Currency of the United States having first ascertained and determined that the assets, property and credits of the said First national bank were wholly insufficient to pay its debts and liabilities and that it was necessary to the complete and entire administration of the trust reposed in said receiver, and in order to pay the liabilities of said banking association, that recourse should be had to the personal liability imposed upon the stockholders of said bank by the statutes of the United States in such case made and provided, levied an assessment and made a requisition upon the shareholders of the said The First National Bank of South Bend for fifty thousand dollars ($50,000), the said sum to be paid by them ratably on or before the 17th day of September, 1896, and the said deputy and acting Comptroller of the Currency of the United States made a demand upon each and every one of the said shareholders for one hundred dollars ($100) upon each and every share of the capital stock of said association held and owned by them respectively at the time of the failure and suspension of the said bank as aforesaid.

IV.

That the said Comptroller of the Currency, by written orders, under his seal of office, directed the receiver of said bank to take all necessary proceedings by suit or otherwise to enforce the liability of the said shareholders for each and every share of the capital stock held by them respectively at the date of the suspension of said bank.

V.

That at the date of the failure and suspension of said bank the defendant was the owner of twenty-five shares of the capital stock of said bank of the par value of one hundred dollars ($100) per share, and the same stood in his name as A. F. McClaine as owner upon the books of said association at said time, and said defendant is now, and was then and ever since has been the owner of the same, and has had due notice of the foregoing orders of the said Comptroller of the Currency. That defendant is now and was at all times herein mentioned a citizen and resident of the district and State of Washington and the western division of the said district.

6 VI.

That said Joseph G. Heim, as receiver, duly demanded of said defendant payment of said assessment upon said stock, and the said defendant was notified that in the event such payment was not made on or before the 17th day of September, 1896, suit would be commenced to enforce the payment thereof.

VII.

That the said assessment upon the said stock has not nor has any part thereof been paid except the sum of two hundred dollars ($200), paid in May, 1897, about the 22d day thereof.

VIII.

That by virtue of the premises and the statute in such case made and provided the defendant is indebted to the plaintiff in the sum of twenty-five hundred dollars ($2,500) and interest thereon from the 17th day of September, 1896, at the rate of seven (7) per cent. per annum, less the said sum of two hundred dollars ($200) paid as aforesaid.

Wherefore, plaintiff prays judgment against the defendant for the sum of twenty-five hundred dollars ($2,500), with interest thereon at the rate of seven (7) per cent. per annum from the 17th day of September, 1896, less the said sum of two hundred dollars ($200) paid as aforesaid, together with his costs and disbursements herein.

HUDSON AND HOLT,
Attorneys for Plaintiff.

Office and P. O. address No. 403–4–5 Berlin building, Tacoma, Washington.

7 STATE OF WASHINGTON, } ss:
County of Pierce, }

Robert G. Hudson, being first duly sworn deposes and says; That he is one of the attorneys for the plaintiff in the above-entitled action; that he has read the foregoing complaint; knows the contents thereof, and believes the same to be true; that he makes this affidavit because the said plaintiff is a nonresident of and now absent from the State and district wherein said action is brought, and affiant has personal knowledge of all the material allegations therein contained.

R. G. HUDSON.

Subscribed and sworn to before me this the 15th day of August, 1899.

[SEAL.]

R. S. HOLT,
Notary Public, Residing at Tacoma,
Pierce County, Washington.

And afterwards, to wit, on the 19th day of August, 1899, there was duly filed in said court in said cause a demurrer to complaint, in the words and figures following, to wit:

(Title of Court and Cause.)

Demurrer.

Comes now the defendant and demurs to the complaint of the plaintiff herein upon the following grounds, to wit:

8 I.

That the complaint does not state facts sufficient to constitute a cause of action.

II.

That the action has not been commenced within the time limited by law.

T. O. ABBOTT,
Attorney for Defendant.

Rooms 220–21, Fidelity bldg., Tacoma, Pierce county, Washington.

I, T. O. Abbott, do hereby certify that the foregoing demurrer is entered in the above-entitled action in good faith, and that I believe the grounds therein stated to be valid grounds of demurrer to the complaint therein.

T. O. ABBOTT,
Attorney for Defendant.

Received copy of within demurrer this 19th day of August, 1899.

HUDSON & HOLT,
Attorneys for Plaintiff.

9 And afterwards, to-wit: on Friday the 2nd day of February, 1900, the same being the 18th judicial day of the regular July term of said court, present the Honorable Cornelius H. Hanford, United States district judge, presiding, the following proceedings were had in said cause, to wit:

In the Circuit Court of the United States for the District of Washington, Western Division.

J. FRANK ALDRICH, as Receiver of First National Bank of South Bend, Plaintiff,
vs.
ADOLPHUS F. MCCLAINE, Defendant.
No. 662.

Order on Demurrer and Judgment.

This cause having on a former day of this court come on for hearing on the demurrer of defendant to the complaint, and the same having been argued by T. O. Abbott, Esq., attorney for defendant, and Messrs. Hudson & Holt, attorneys for plaintiff, and the court having taken the same under advisement, and having rendered and filed herein an opinion sustaining said demurrer on the second ground thereof, to-wit: the statute of limitations; now, therefore, it is hereby

Ordered and adjudged that the demurrer of the defendant to the complaint herein, be and the same is hereby sustained on the following ground only, to-wit: "That the action has not been
10 commenced within the time limited by law."

Thereupon the plaintiff by his attorneys announced to the court that plaintiff would stand on his complaint and decline to plead further.

Whereupon it was further ordered and adjudged that said complaint and this action be and the same is hereby finally dismissed, and that defendant have and recover of plaintiff his costs herein. To all of which rulings the plaintiff at the time excepted, and had his exceptions duly allowed by the court.

Ordered and adjudged this the 2nd day of February, A. D. 1900.

C. H. HANFORD, *Judge.*

Endorsed: Filed in the U. S. circuit court Feb. 2, 1900. A. Reeves Ayres, clerk, Sam'l D. Bridges, dep.

And thereafter, by due proceedings had, a writ of error was duly issued in said cause to the United States circuit court of appeals for the ninth circuit, and

Afterwards, to-wit: on the 7th day of March, A. D. 1901, a mandate was issued by said court and duly entered in this action as hereafter appears.

11 And afterwards, to-wit: on the 27th day of March, 1901, there was duly filed in said court in said cause a mandate of the United States circuit court of appeals, in the words and figures following, to-wit:

UNITED STATES OF AMERICA, *ss*:

The President of the United States of America to the honorable the judges of the circuit court of the United States for the district of Washington, western division, Greeting:

Whereas, lately in the circuit court of the United States for the district of Washington, western division, before you, or some of you, in a cause between *J. Frank Aldrich*, as receiver of the First National Bank of South Bend, plaintiff, and *Adolphus F. McClaine*, defendant, No. 662, a judgment was duly filed and entered, which said judgment is of record in the office of the clerk of said circuit court (to which record reference is hereby made and the same is hereby expressly made a part hereof), as by the inspection of the transcript of the record of the said circuit court, which was brought into the United States circuit court of appeals for the ninth circuit by virtue of a writ of error agreeably to the act of Congress in such cases made and provided, fully and at large appears:

And whereas, on the 12th day of September, in the year of our Lord one thousand, nine hundred, the said cause came on to be heard before the said circuit court of appeals, on the said transcript of record, and was argued by counsel:

12 On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said circuit court in this cause be, and the same is hereby reversed, with costs, and the cause remanded to said circuit court with directions to overrule the demurrer. (Feb'y 14, 1901.)

You therefore, are hereby commanded that such further proceedings be had in said cause, in accordance with the opinion and judgment of this court and as according to right and justice and the laws of the United States ought to be had, the said judgment of said circuit court notwithstanding.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 7th day of March, in the year of our Lord one thousand, nine hundred and one.

[SEAL OF THE COURT.] F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

Costs of Plaintiff in Error.

Transcript, paid clerk below	$17.55
Clerk U. S. circuit court of appeals	25.25
Printing record	25.50
Attorney's docket fee	20.00
Taxed at	$88.30

F. D. MONCKTON, *Clerk.*

13 *Costs of Plaintiff in Error.*

Transcript, paid clerk below	$17.55
Docketing cause and filing record	5.00
Entering 2 appearances	.50
Entering order	.20
Filing 6 papers	1.50
Filing briefs for each party appearing	10.00
Printing transcript of record	25.50
Transferring cause to printer calendar	1.00
Drawing, filing and recording judgment	1.65
Mandate, costs and copy	5.40
Attorney's docket fee	20.00
Taxed at	$88.30

F. D. MONCKTON, *Clerk.*

Endorsed: Filed in the U. S. circuit court Mar. 27, 1901, A. Reeves Ayres, clerk, by Sam'l D. Bridges, dep.

14 And afterwards, to-wit: on the 27th day of March, 1901, there was duly filed in said court in said cause an order, in the words and figures following, to wit:

In the Circuit Court of the United States for the District of Washington, Western Division.

J. FRANK ALDRICH, as Receiver of First National Bank of South Bend, Plaintiff,
vs.
ADOLPHUS F. MCCLAINE, Defendant. } No. 662.

Order.

On motion of plaintiff, and in accordance with the mandate of the United States circuit court of appeals for the ninth circuit, in case numbered 604 therein, being a writ of error from this court sued out by the plaintiff in this action, directing this court to render an order in this action overruling the demurrer of the defendant herein,

It is hereby ordered that said demurrer be and the same is hereby overruled, and the final judgment heretofore rendered in this action in this court sustaining said demurrer and dismissing plaintiff's complaint, is set aside and annulled.

It is further ordered that the plaintiff have and recover of and from the defendant, Adolphus F. McClaine, in the sum of $88.30, being the amount of costs as shown by said mandate for which he is liable in the writ of error sued out to said circuit court of appeals.

15 Ordered and adjudged this the 27th day of March, A. D. 1901.

C. H. HANFORD, *Judge.*

Endorsed: Filed in the U. S. circuit court Mar. 27, 1901. A. Reeves Ayres, clerk, by Sam'l D. Bridges, dep.

15*a* And afterwards, to wit, on Wednesday, the 29th day of May, 1901, the same being the nineteenth judicial day of the regular February term—the Honorable C. H. Hanford, United States district judge, presiding—the following proceedings were had in said cause, to wit:

Order Overruling Second Demurrer.

Now, on this day, on motion of the defendant, leave is granted the defendant to file a second demurrer to the complaint herein; whereupon said demurrer was argued by counsel, and the court being duly advised in the premises, orders that the said demurrer be, and the same is hereby, overruled.

To which ruling the defendant excepted, and his said exception is hereby allowed.

It is further ordered that said defendant be, and he is hereby, granted ten days within which to file his answer herein.

16 And afterwards, to wit: on the 13th day of June, 1901, there was duly filed in said court in said cause an amended answer, in the words and figures following, to wit:

(Title of Court and Cause.)

Amended Answer.

Comes now the defendant and not waiving any rights heretofore existing in this action for his answer to the complaint of plaintiff, states as follows, to wit:

I.

He admits the allegations of paragraph I of said complaint.

II.

He admits the allegations of paragraph II of said complaint.

17 III.

He denies all the allegations of paragraph III of said complaint.

IV.

He denies all the allegations of paragraph IV of said complaint.

V.

He admits all the allegations of paragraph V of said complaint, except that he has had due notice or any notice of any of the orders or alleged orders referred to in said paragraph; which allegations he denies.

VI.

He denies all the allegations of paragraph VI of said complaint.

VII.

He denies all the allegations of paragraph VII of said complaint.

VIII.

He denies all the allegations of paragraph VIII of said complaint.

For a first affirmative defense to the allegations of said complaint, defendant alleges as follows, to wit:

I.

That on or about the 30th day of December, 1897, Joseph G. Heim, as receiver of said First National Bank of South Bend, Washington, while acting as said receiver, and before his resignation and the appointment of the plaintiff herein, began an action against this defendant in the superior court of the State of Washing-
18 ton for Pierce county, which said action was numbered 16,663 among the records of the clerk of said court; the complaint in said action, being in words and figures as follows, to wit:

In the Superior Court of the State of Washington in and for the County of Pierce.

JOSEPH G. HEIM, as Receiver of the First National Bank of South Bend, Washington, Plaintiff,
vs.
A. F. McCLAINE and MAE U. McCLAINE, His Wife, Defendants.

Complaint.

The above-named plaintiff, as receiver of the First National Bank of South Bend, Washington, complains of the said defendants and alleges:

First. That the First National Bank of South Bend, Washington, is and was at all the times herein mentioned, a banking corporation, organized under the laws of the United States.

Second. That said First national bank being insolvent closed its doors and suspended business on the 10th day of August, 1895, and the Comptroller of the Currency of the United States having ascer-

tained and determined that the said bank was insolvent on the 17th day of August, 1895, duly appointed Joseph G. Heim, the plaintiff the receiver of the said First national bank, the said Joseph G
19 Heim is now the duly appointed acting and qualified receiver of said corporation under and by virtue of the laws of the United States providing for the appointment of receivers of national banking associations.

Third. That on the 17th day of August, 1896, the deputy and acting Comptroller of the Currency of the United States, having first ascertained and determined that the assets, property and credits of said First national bank were wholly insufficient to pay its debts and liabilities, and that it was necessary to the complete and entire administration of the trust reposed in him, and in order to pay the liabilities of said banking association that recourse should be had to the personal liability imposed upon the stockholders of said bank by the statutes in such case made and provided, levied an assessment and made a requisition upon the shareholders of the said "The First National Bank of South Bend" for fifty thousand dollars ($50,000) to be paid by them ratably on or before the 17th day of September, 1896, and made a demand upon each and every one of said shareholders for one hundred dollars ($100) upon each and every share of the capital stock of said association held or owned by them respectively at the time of its failure.

Fourth. That the said deputy Comptroller of the Currency by a written order dated the 17th day of August, 1896, and under his seal of office, directed this plaintiff, as said receiver, to take all necessary proceedings, by suit or otherwise, to enforce the liability of the said stockholders to the extent of one hundred dollars ($100) upon each and every share of the said capital stock held or owned
20 by them, respectively, at the date of the suspension of said bank.

Fifth. That at the date of the failure of said bank, the defendant, A. F. McClaine, was the owner of twenty-five (25) shares of the capital stock of said bank of the par value of one hundred dollars ($100) per share, and the same stood in his name as such owner upon the books of said association at said time, and said defendant is now and ever since has been the owner of the same, and said defendant has had due notice of the foregoing order of said deputy Comptroller of the Currency.

Sixth. That this plaintiff has duly demanded of the said defendant, A. F. McClaine, the payment of said assessment upon the said stock and said defendant was notified that in the event such payment was not made on or before the 17th day of September, 1896, suit would be commenced to enforce the payment thereof.

Seventh. That at the time said defendant, A. F. McClaine, subscribed and secured the said shares of stock of said banking association and now and ever since said date, he and the defendant, Mae U. McClaine, were husband and wife, and that said subscription and said ownership of said stock was and is for the benefit of the com-

munity then and now existing between the said A. F. McClaine and Mae U. McClaine, his wife.

Eighth. That said assessment upon said stock has not, nor has any part thereof been paid; that by virtue of the premises and of the statutes in such case made and provided, the defendant, A. F. McClaine and the community composed of said A. F. Mc-
21 Claine and Mae U. McClaine, became and are indebted to the plaintiff in the sum of twenty-five hundred dollars ($2500), with interest thereon from the 17th day of September, 1896.

Wherefore, the plaintiff prays for a judgment against A. F. McClaine in the sum of twenty-five hundred dollars ($2500), with interest thereon from the 17th day of September, 1896, at the rate of seven (7) per cent. per annum, and for his costs and disbursements herein.

It is further prayed that the judgment herein be declared a charge upon the community property of said A. F. McClaine and Mae U. McClaine.

BONEY & HOYT,
Attorneys for Plaintiff.

P. O. and office address, 526 the Rookery, Spokane, Washington.

STATE OF WASHINGTON, } ss:
County of Spokane, }

Richard K. Boney, being duly sworn, deposes and says:

That he is one of the firm of Boney & Hoyt, attorneys for the plaintiff in the above-entitled action; that he has read the foregoing complaint, knows the contents thereof, and believes the same to be true; that he makes this affidavit because the said Joseph G. Heim is not now within the said county of Spokane, nor within the said county of Pierce, and because the said affiant has personal knowledge of all the material allegations contained in the foregoing complaint.

RICHARD K. BONEY.

Subscribed and sworn to before me this 28th day of February, 1897.

E. W. TAYLOR,
Notary Public, Residing at Spokane, Washington.

22 II.

That thereafter on said date, the findings of fact and conclusions of law of said court were entered in said cause wherein and whereby all the allegations of said complaint were found and declared to be true and decree was thereupon entered against this defendant in words and figures as follows, to wit:

In the Superior Court of the State of Washington in and for the County of Pierce.

JOSEPH G. HEIM, as Receiver of the First National Bank of South Bend, Washington, Plaintiff,
vs.
A. F. McCLAINE and MAE U. McCLAINE, His Wife, Defendants.

Decree.

The plaintiff having moved the court for judgment upon the foregoing facts and conclusions of law found by the court, and the court upon consideration thereof, does hereby order, adjudged and decree as follows, to wit:

That the plaintiff, Joseph G. Heim, as receiver of the First National Bank of South Bend, Washington, do have and recover from the defendant, A. F. McClaine, the sum of two thousand three hundred dollars ($2,300.00) with interest thereon at the rate of seven per cent. per annum from the 17th day of September, 1896, until paid.

23 And does further order, adjudge and decree that said defendant pay the costs and disbursements of this action, taxed at the sum of $10.00.

And it is hereby further adjudged and decreed that the plaintiff have execution against said defendant to enforce the payment of the sum so decreed to be paid, and the said costs and disbursements.

And it is further ordered that such execution issue against the community property of the said A. F. McClaine and Mae U. McClaine, his wife, as well as against the individual property of said A. F. McClaine.

Dated December 30th, 1897.

J. A. WILLIAMSON,
Superior Judge.

III.

That thereafter, to wit, on the 21st day of March, 1899, an order was made by said superior court in said cause vacating and setting aside the decree set forth in the preceding paragraph hereof, said order being in words and figures, as follows, to wit:

24 In the Superior Court, Pierce County, Washington.

JOSEPH G. HEIM, Receiver, etc., Plaintiff,
vs.
A. F. MCCLAINE ET AL., Defendants. } No. 16663.

Memorandum of Journal Entry.

This cause coming on to be heard, upon the motion of defendants, filed herein, to vacate and set aside the judgment entered in this action on the 30th day of December, 1897, and the court having examined the evidence in support of said motion, and having heard argument of counsel, and being fully advised; it is hereby ordered, adjudged and decreed, that the said judgment be and hereby is vacated and set aside, and is declared of no effect and void and the clerk of this court is hereby directed to cancel and discharge the same upon the records.

IV.

That thereafter, to wit, on the 10th day of March, 1898, an order was entered in said action by said superior court at the request of the plaintiff in said action, dismissing said action, and without notice to the defendant therein, without prejudice; said order being in words and figures, as follows, to wit:

25 In the Superior Court of the State of Washington in and for the County of Pierce.

JOSEPH G. HEIM, as Receiver of the First National Bank of South Bend, Washington, Plaintiff,
vs.
A. F. MCCLAINE ET AL., Defendants. } No. 16663. Department 1.

Order Dismissing Action.

The above-entitled cause coming on regularly to be heard upon the motion of the plaintiff for an order dismissing the action, and the court having read the affidavit of Richard K. Boney in support of said motion, and having examined the files herein, and it appearing to the court that no answer has been interposed in said action, and no counterclaim or setoff having been set up by said defendants, or either of them.

It is by the court ordered that said action be, and the same is hereby dismissed, without prejudice, at plaintiff's cost.

Done in open court this 10th day of March, 1898.

J. A. WILLIAMSON, *Judge.*

V.

That thereafter, to wit, on the 25th day of April, 1898, th
referred to in the last preceding paragraph hereof, was on
plication of the defendant therein and after a hearin
26 the merits thereof, amended by said superior court
order, duly entered on said date; said order being in
and figures, as follows, to wit:

In the Superior Court, Pierce County, Washington.

JOSEPH G. HEIM, Receiver, etc., Plaintiff,
vs.
A. F. MCCLAINE ET AL., Defendants.

Memorandum of Journal Entry.

This cause coming on this day for hearing on the motion
fendants for an order setting aside the order of dismissal
action because said defendants were never served with notice
application for dismissal and the court, having heard said
and argument of counsel, and the counsel for defendants
other things objected to said order of dismissal so far as it
that this action was dismissed without prejudice, whereupon
for plaintiff consented that the words "without prejudice"
dismissal might be stricken out, it is therefore ordered tha
words "without prejudice" be stricken out of said order of dis
and that said motion to set aside said order of dismissal be, a
same is, hereby overruled and dismissed, to which defendants
and their exceptions are allowed.

VI.

That all of the matters and proceedings set forth a
27 curring in said action in said superior court related
were on account of the assessment or alleged assessm
forth in the complaint herein; and that this plaintiff was
thereby barred and estopped from maintaining this action.

And for a second affirmative defense, and by way of counte
plaintiff alleges as follows, to wit:

I.

That on or about the 5th day of April, 1897, Joseph G. He
then being the duly qualified and acting receiver of the said
National Bank of South Bend, brought an action in the su
court of the State of Washington, for Pierce county, against
fendant herein on account of the assessment or alleged asse
set forth in the complaint herein, by serving upon said defen
copy of the original summons and complaint in said action.

II.

That on or about the 8th day of April, 1897, and before the original summons and complaint in said action had been filed with the clerk of said court, this defendant, by way of compromise of the said claim, made a certain proposal in writing to said Heim as said receiver for the dismissal of said action, as follows, to wit:

That in consideration of the immediate dismissal of said action, this defendant would sell and deed to said plaintiff those certain premises known and described as lots three (3) and four (4), block twenty-seven (27), corrected plat of South Bend, at the agreed price
of four hundred fifteen and eighty-three one hundredths
28 dollars ($415.83), the sum of two hundred fifteen and eighty-three one hundredths dollars ($215.83) thereof to be applied in payment of a claim held by said plaintiff against one J. W. Morgan (amounting to said sum of two hundred fifteen and eighty-three one hundredths dollars) and the sum of two hundred dollars ($200), thereof, to be credited upon said stock assessment; (the same being the stock assessment referred to in the complaint herein); and thereafter, said Heim as said receiver, did notify this defendant that he accepted said proposal, according to the terms thereof, and did request defendant to execute and forward to him in his capacity as said receiver, a good and sufficient deed to said premises.

III.

That on or about the 29th day of April, 1897, this defendant, relying upon the good faith and honesty of purpose of said Heim as said receiver, and believing that he would faithfully carry out said agreement to dismiss said action; did make, execute and deliver to said Heim as said receiver, a good and sufficient deed to said premises, and said Heim as said receiver, did accept said deed, and did as this defendant is informed and believes, place said real property among the assets of his said trust.

IV.

That, contrary to the terms of said agreement, and in violation thereof, the said Heim, as said receiver, did not dismiss said action, but did subsequently, to wit: on the 30th day of December, 1897,
file the original of said summons and complaint, with the
29 clerk of said superior court, and said cause was numbered 16,663 among the records of said clerk; and said Heim, as said receiver, did apply for and obtain a default against this defendant and did apply for and obtain a judgment against this defendant on account of the matters alleged in said complaint in the sum of twenty-three hundred dollars ($2300) with interest thereon at the rate of seven per cent. per annum from the 17th day of September, 1896, together with costs taxed in said action at ten dollars ($10); that thereafter, upon the application of defendant, by due proceedings had in said action, after a trial upon the merits thereof,

said judgment was vacated and set aside and declared of no effect and void.

V.

That thereafter, and before said summons and complaint was filed as aforesaid, to wit, on or about the 8th day of April 1897, at the request of said Heim as said receiver, this defendant made further proposals to said Heim as said receiver, to compromise and settle the balance of the said assessment in excess of the amount to be credited thereon as the proceeds of the sale of said premises; and said Heim as said receiver, did urge and request defendant to make a payment to him as an inducement and evidence of good faith on the part of defendant, to enable him to secure the ratification and confirmation of said further proposal, by the Comptroller of the Currency and by a court of competent jurisdiction, and on or about the 27th day of May, 1897, in order to induce the said Heim as said receiver to secure the confirmation and ratification of said further proposal by the Comptroller of the Currency, and by a court of competent jurisdiction, did pay to said Heim as said receiver, to be by him held in trust for this defendant until said further proposal should be so confirmed and ratified, the sum of two hundred dollars ($200), gold coin of the United States of America, which said sum, the said Heim as said receiver, did accept for said purpose; but defendant alleges that the proposal in this paragraph mentioned, was afterwards declined by said Helm as said receiver, and that he failed and neglected to make any effort to secure the ratification and confirmation thereof as aforesaid, and that said proposal was never ratified or confirmed by said Comptroller of the Currency, or by any court of competent jurisdiction; and defendant is informed and believes that said sum of two hundred dollars ($200) was deposited by said Heim as said receiver among the assets of his said trust, and is now held by the plaintiff herein as a part of said assets.

VI.

(Stricken.)

That, thereafter, to wit, on or about the 18th day of April, 1898, the said Heim as said receiver, began an action against this defendant in the circuit court of the United States for the district of Washington, western division, for the alleged purpose of recovering judgment against this defendant, on account of an alleged contract growing out of the proposals hereinbefore set forth; that said cause was numbered 588 among the records of the clerk of said circuit court; and thereafter, the plaintiff herein was substituted as the plaintiff in said action, the said Heim having theretofore resigned his said office as said receiver; and thereafter, to wit, on or about the 24th day of June, 1899, by due proceedings had, and after a full trial of all the issues and facts therein, upon

the merits thereof, judgment was rendered in favor of this defendant and against the plaintiff herein, dismissing said action.

VII.

That, under and by virtue of all the matters and things hereinbefore in this affirmative defense set forth, the benefits and advantages of the said proposals for a compromise of said claim was and were totally lost to this defendant, and the consideration for the making of the said deed to said premises and the payment of the said sum of two hundred dollars ($200) to said Heim as said receiver, totally failed; and the said plaintiff herein, has unlawfully converted the same without the consent and against the will of this defendant.

VIII.

(Stricken.)

That defendant was compelled, on account of the various proceedings hereinbefore in this affirmative defense set forth, to employ counsel, and the fair and reasonable value of the services as said attorneys' fees is three hundred and fifty dollars ($350).

IX.

(Stricken.)

That the true and fair value of the premises hereinbefore
32 described is fifteen hundred dollars ($1500); and the true and fair value of the gold coin paid into the hands of said Heim, as aforesaid, is two hundred dollars ($200) together with legal interest thereon from the 27th day of May, 1897.

X.

(Stricken.)

That defendant has made demand upon the plaintiff for the return of said described premises, or in lieu thereof, of the sum of fifteen hundred dollars ($1500); and also for the sum of two hundred dollars ($200), together with interest thereon from the 27th day of May, 1897, at the legal rate; and also for the sum of three hundred and fifty dollars ($350) on account of expenses and attorneys' fees incurred in the various actions hereinbefore mentioned; and said demands and each of them have been refused by plaintiff and he has refused and declined to pay the same or any part thereof.

XI.

That, by virtue of all the matters and things hereinbefore set forth, this defendant has been damaged as follows, to wit:

(Stricken.)

On account of the unlawful conversion of said premises as afore said, the sum of fifteen hundred dollars ($1500);

On account of the payment to said plaintiff on the 22d day of May, 1897, as aforesaid, the sum of two hundred dollars, ($200), together with interest thereon at the legal rate from said date.

33 (Stricken.)

On account of expenses and attorneys' fees incurred as aforesaid, the sum of three hundred and fifty dollars ($350).

Wherefore, defendant prays judgment against the plaintiff as follows, to wit:

First. That he be dismissed hence without day.

Second. That he do have and recover judgment against the plaintiff as damages in the sum of fifteen hundred dollars ($1500); and also for the sum of two hundred dollars ($200), with interest thereon from the 22d day of April, 1897, at the legal rate; also for the sum of three hundred and fifty dollars as attorneys' fees.

Third. For such other and further relief as to the court shall seem equitable and just, the premises considered.

T. O. ABBOTT,
Attorney for Defendant, Rooms 408–10,
Equitable Bldg., Tacoma, Wash.

STATE OF WASHINGTON, } ss:
County of Pierce, }

I, A. F. McClaine, being first duly sworn, do on oath, depose and say that I am the defendant in the foregoing entitled action; that I have read the foregoing answer, know the contents thereof, and the same is true, as I verily believe.

A. F. McCLAINE.

34 Subscribed and sworn to before me this 6th day of June, 1901.

[SEAL.]

F. H. MURRAY,
Notary Public, Residing at Tacoma,
Pierce County, Washington.

Received copy of within answer this 6th day of June, 1901.

HUDSON & HOLT,
Attorneys for Plaintiffs.

35 And afterwards, to wit, on the 10th day of July, 1901, there was duly filed in said court in said cause a demurrer to amended answer, in the words and figures, following, to wit:

(Title of Court and Cause.)

Demurrer to Amended Answer.

Now comes the plaintiff by his attorneys, Hudson & Holt, and demurs to that part of the amended answer of defendant, styled "first affirmative defense."

Because the matter set out therein does not constitute a defense to the action.

HUDSON & HOLT,
Attorneys for the Plaintiff.

I, R. G. Hudson, of the firm of Hudson & Holt, attorneys for the plaintiff in the aforesaid action, do hereby certify that in my opinion the foregoing demurrer is well founded in point of law.

——— ———.

I hereby acknowledge receipt of a copy of the aforesaid demurrer this the 10th day of July, 1901.

T. O. ABBOTT,
Attorney for Defendant.

And afterwards, to wit, on the 10th day of July, 1901, there was duly filed in said court in said cause an order, in the words and figures following, to wit:

36 (Title of Court and Cause.)

Order.

The demurrer of plaintiff to the first affirmative defense in the amended answer of defendant and the motion to strike certain portions of the second affirmative defense and counterclaim of said answer, came on this day for hearing; and the same being fully heard and considered by the court:

It is ordered that the said demurrer and motion be, and the same are hereby sustained, and the following portions of said amended answer are stricken out, to wit: Paragraphs VI, VIII, IX, X, and the following words in paragraph XI, viz: "On account of the unlawful conversion of said premises as aforesaid the sum of fifteen hundred dollars ($1500)" of that portion of said answer called the second affirmative defense and counterclaim. Plaintiff is allowed ten days to file a reply.

To all of which said defendant excepted and had his exception allowed.

Ordered this the 10th day of July, A. D. 1901.

C. H. HANFORD, *Judge.*

37 And afterwards, on Wednesday, the 20th day of November, 1901, the same being the 13th day of the regular July term of said court—present, the Honorable C. H. Hanford, United States district judge presiding—the following proceedings were had in said action, to wit:

Record of Trial.

Now, on this day, this action came regularly on for trial before the court without a jury, a trial by jury having heretofore, by a stipulation in writing duly filed herein, been expressly waived, Mr. R. G. Hudson appearing for the plaintiff, and Mr. T. O. Abbott, appearing for the defendant. At the conclusion of the introduction of evidence and the arguments of counsel, the court orally announced its decision in favor of the plaintiff, and directed that judgment be entered in accordance with said decision as announced.

And afterwards, to wit, on the 27th day of November, 1901, there *was* duly filed in said court in said cause findings and conclusions, in the words and figures following to wit:

(Title of Court and Cause.)

Findings and Conclusions.

This action came on regularly for trial before the court, a jury being waived, on the 20th day of November, A. D. 1901, and the same was fully heard, and argued by counsel of the respect-
38 ive parties, and the court, having fully considered of the same, and announced a decision in favor of plaintiff, and continued the matter of findings of fact and conclusions of law to this date, doth now make the following findings and conclusions:

Findings of Fact.

1st. That the First National Bank of South Bend, Washington, was and is a corporation duly organized under the laws of the United States, and formerly doing business at South Bend, Washington.

2d. That said bank became insolvent and suspended business August 10th, 1895; that a receiver was appointed therefor and the plaintiff is now its receiver.

3d. That on August 17th, 1896, the deputy and acting Comptroller of the Currency of the United States, after ascertaining and determining that the assets and property of said bank were wholly insufficient to pay its debts and liabilities and that it was necessary to levy an assessment on the stockholders, of one hundred per cent. Made said levy on August 17th, 1896.

4th. That said levy was made, and the defendant was given due notice thereof, and a demand was duly made of him to pay said assessment on or before the 17th day of September, 1896.

5th. That the defendant was the owner of twenty-five shares of the stock of said bank of the par value of $100 per share, and the amount of the assessment against him was $2,500.

6th. That the plaintiff admits a payment of $200 in money
39 by said defendant, made to the former receiver under a proposition of compromise of the claim sued on in this action, and has given credit therefor in his complaint.

7th. That plaintiff also in his reply offers to give credit for $200 additional on said claim as of April 29th, 1897, on account of the transfer by the defendants to the former receiver, of lots 3 and 4, block 27, corrected plat of South Bend, which offer the defendant now, in open court, declined to refuse or accept.

Conclusions of Law.

The court concludes that plaintiff is entitled to recover of defendant the sum of $2,500, with interest thereon from September 17th, 1896, at the rate of seven per cent. per annum, less a credit thereon of two hundred dollars on the 22d day of May, 1897, and a further credit of $200 of date April 29th, 1897, on account of the transfer of lots 3 and 4, block 27, corrected plat of South Bend, if he would accept the same, but as he declines to say whether he will accept the same or not, the court concludes that it has no right to allow said credit of its own motion and without the assent of the defendant.

Dated this the 27th day of November, A. D., 1901.

C. H. HANFORD, *Judge.*

Service by receipt of a copy hereof admitted this 26th day of November, 1901.

T. O. ABBOTT,
Attorney for Defendant.

40 And afterwards, to wit, on the 27th day of November, 1901, there *was* duly filed in said court in said cause defendant's exceptions to findings and conclusion, in the words and figures following, to wit:

(Title of Court and Cause.)

Defendant's Exceptions to Findings and Conclusion.

Comes now the defendant, and reserving all rights heretofore reserved during any of the proceedings herein, and excepts to the findings of fact and conclusion of law, heretofore entered by this court, as follows:

I.

He excepts to the 3d finding of fact upon the ground that the same is not supported by evidence herein.

II.

He excepts to the 4th finding of fact upon the ground that the same is not supported by evidence herein.

III.

He excepts to the 5th finding of fact upon the ground that the same is not supported by evidence herein.

IV.

He excepts to the 6th finding of fact upon the ground that the same is not supported by evidence herein.

V.

He excepts to the 7th finding of fact upon the ground that the same is not supported by evidence herein.

41 & 42 VI.

He excepts to the conclusions of law upon the ground that the same *is* not based upon or supported by the findings of fact.

T. O. ABBOTT,
Attorney for Defendant.

Rooms 408–10 Equitable bldg., Tacoma, Washington.

Exceptions allowed.

C. H. HANFORD, *Judge.*

Received copy 11–27, '01.

HUDSON & HOLT, *Attorneys.*

43 And afterwards, to wit, on the 27th day of November, 1901, there was duly filed in said court in said cause a judgment, in the words and figures following, to wit:

(Title of Court and Cause.)

Judgment.

The court, having made its findings of fact and conclusions of law in this action, it is

Ordered and adjudged that the plaintiff, J. Frank Aldrich as receiver of the First National Bank of South Bend, Washington, do have and recover of the defendant, Adolphus F. McClaine, the sum

of thirty-one hundred and eighty-three and $\frac{47}{100}$ ($3183.47) dollars, the amount now due and the costs of this action, taxed at — dollars, and that execution issue therefor, according to law.

Ordered and adjudged this the 27th day of November, A. D. 1901.

C. H. HANFORD, *Judge.*

Defendant excepts Exception allowed.

C. H. HANFORD, *Judge.*

44 And afterwards, to wit, on the 4th day of December, 1901, there was duly filed in said court in said cause a bill of exceptions, in the words and figures following, to wit:

(Title of Court and Cause.)

Bill of Exceptions.

Be it remembered, that on the 23d day of November, 1901, at a stated term of said court begun and holden in the city of Tacoma, in and for the district aforesaid, before his honor C. H. Hanford, circuit judge, the issues joined in the above cause between the said parties came on to be tried before the said judge without the intervention of a jury, the parties aforesaid, by their counsel, having according to the statute in such case made and provided, waived a jury; the plaintiff being represented by his attorneys, Hudson and Holt, and the defendant by his attorney, T. O. Abbott; and upon trial of said issues, the plaintiff offered in evidence the following:

A certified copy of an order of the deputy and acting Comptroller of the Currency of the United States, making an assessment of the shareholders of the First National Bank of South Bend, Washington, dated August 17, 1896; the same was received by the court and marked Plaintiff's Exhibit "A."

An affidavit of Joseph G. Heim, dated October 1st, 1901, attached to which, were two certain exhibits, and a stipulation of the parties hereto, that the said affidavit and exhibits might be offered in evidence subject to any objection to the incompetency, immateri-
45 ality, and irrelevancy of the subject matter thereof, but waiving objection as to the manner of taking the same. The defendant objected to the said affidavit, and said exhibits, on the ground that the same were incompetent, immaterial, and irrelevant; and further, that the said exhibits were not the best evidence of the matters therein purported to be set forth, upon the ground that they were not original documents, and that no demand had been made upon the defendant for the originals thereof. And after argument by counsel, the objection of the defendant was overruled, and said affidavit was admitted by the court, and marked Plaintiff's Exhibit "B;" whereupon said defendant excepted to the said ruling of said court, and said exception was allowed.

A stipulation of the parties for the introduction of copies of c
tain records and that said copies should be of the same force a
effect as the originals thereof, and that no certification of said copi
should be required under said stipulation, plaintiff offered the co
plaint and answer and amended answer of A. F. McClaine in th
certain action formerly pending in the above-entitled court betwe
these parties, numbered 588 among the records of the clerk of sa
court, which said papers were received by said court without obj
tion.

Thereupon plaintiff rested.

Thereupon, the defendant moved for a nonsuit, upon the grou
that the proof offered by the plaintiff was insufficient to justify
decision on behalf of plaintiff, and did not tend to prove any of t
material issues; said motion was denied by the court; to whi
order, defendant excepted and said exception was allowe

46 Whereupon, the defendant in order to maintain and pro
the issues on his parts, did offer in evidence the following:

A copy of the records and pleadings in that certain cause in t
superior court of the State of Washington for Pierce county, entitl
Joseph G. Heim, as receiver of the First National Bank of Sou
Bend, Washington, plaintiff, *vs.* A. F. McClaine and Mae U. M
Claine, his wife, defendants, numbered 16,663 among the records
the clerk of said superior court. The said offer was objected to
the plaintiff, because the same was not relevant, or material, and n
competent, under any issue or pleading in the case; but said obj
tion was overruled, and the said record was admitted and mark
Defendant's Exhibit "A."

A certified copy of the petition to the above-entitled court and t
order of the said court based upon said petition "in the matter
the application of Joseph G. Heim, receiver of the First Nation
Bank of South Bend, Washington, for authority to compromise a
sell the remaining assets of said bank in liquidation" (mark
"Defendant's Identification 1"), and also the order confirming t
acts and doings of the said Heim, as said receiver, acting under t
direction of the previous order of said court (marked as "Defen
ant's Identification 2"), for the purpose of showing that the plainti
in this action is not entitled to maintain the same for want of t
authority of the Comptroller of the Currency, and of a court of co
petent jurisdiction. The said offer was objected to by t

47 plaintiff, and after argument said objection was sustaine
to which order the defendant excepted, and said exceptio
was allowed.

The entire record in that certain action between the parties here
in the above-entitled court, numbered 588. Said offer was object
to by the plaintiff, because the same was not relevant or materia
and not competent under any issue or pleading in the case; whic
objection was overruled, and said record was admitted by the cou
and marked Defendant's Exhibit "B." Copies of letters relative
the assessment and matters connected therewith, the same bei
stipulated between the parties as true and correct copies of the ori

inals of said letters. The plaintiff objected to said letters being received in evidence, because the same were not relevant, or material and not competent under any issue or pleading in the case. Said objection was overruled, and said copies were received by the court and marked Defendant's Exhibit "C."

Whereupon, the defendant, ADOLPHUS F. MCCLAINE, was called as a witness in his own behalf, and testified as follows: That he had made no payments to the receiver of the said First National Bank of South Bend, on account of the assessment alleged in the complaint herein, but, that he had deeded to said receiver, lots three (3) and four (4), block twenty-seven (27), corrected plat of South Bend, for an agreed price in consideration of a compromise or proposed compromise of said assessment, and to induce the dismissal of a certain suit, then pending; and further, that he afterwards paid said receiver two hundred dollars ($200) for the purpose of a further
48 compromise of the balance of said assessment; that neither said lots nor said two hundred dollars ($200) had ever been returned to him; that the value of said lots was twelve hundred dollars ($1200). Thereupon, in answer to questions by the attorney for the plaintiff, the said witness stated that he lived in the city of Tacoma, and that he had never lived in said city of South Bend, and that he did not have general knowledge of the values of real property in said city of South Bend. Thereupon, said witness testified further in his own behalf, that he had special knowledge in regard to the value of said lots. Thereupon, said witness was excused.

Thereupon, defendant rested.

Thereupon, plaintiff rested.

Thereupon, the defendant moved for judgment against the plaintiff upon the ground that it appears from the evidence, that another action was brought by said plaintiff against this defendant for the purpose of recovering judgment upon an alleged contract of compromise of the assessment set forth in the complaint, and that said action was decided adversely to the plaintiff; and that therein and thereby, the plaintiff elected to recover upon said contract, and therein and thereby is estopped to maintain this action, the remedy herein sought, being inconsistent to the remedy sought in said action. And upon the further ground that this action is barred, and plaintiff is estopped from maintaining the same by reason of the institution of the said action numbered 16,663 in the said superior court of the State of Washington for Pierce
49 county, among the records of the clerk of said court, and the various proceedings had therein and the agreed dismissal thereof. And upon the further ground that the plaintiff herein has no power to maintain this action, for the reason that under and by virtue of the proceedings set forth "In the matter of the application of Joseph G. Heim, receiver of the First National Bank of South Bend, Washington, for authority to compromise and sell the remaining assets of said bank in liquidation," the

said proceedings not having been since altered, modified, or set aside, and no authority having been given by the Comptroller of the Currency, or by any court of competent jurisdiction to institute and maintain this action; and further that it appears from the evidence herein, that the plaintiff has obtained the premises known and described as lots three (3) and four (4), block twenty-seven (27) corrected plat of South Bend, together with two hundred dollars ($200) in cash, under and by virtue of negotiations for compromise and settlement of said assessment, and has not returned the same, or any part thereof, to this defendant, but withholds the same as part of the assets in his hands as said receiver. The said court, after considering the issues and the evidence submitted, denied the motion of defendant, rendered a decision in favor of the plaintiff and instructed the attorney for said plaintiff to prepare findings of fact and conclusions of law in accordance with said decision, and submit the same at the next sitting of said court.

And, now, on this 4th day of December, 1901, for as much as the facts aforesaid and the decisions of the court thereon, do
50 not appear of record, the defendant prays: That this, his bill of exceptions may be allowed; and that all the aforementioned exhibits be made a part hereof.

So ordered.

C. H. HANFORD, *Judge.*

Received December 4th, 1901, copy of bill of exceptions in the aforesaid action.

HUDSON & HOLT,
Attorneys for Plaintiff.

And afterwards, to wit, on the 28th day of December, 1901, there was duly filed in said court in said cause an assignment of errors in the words and figures following, to wit:

(Title of Court and Cause.)

Assignment of Errors.

Comes now the above-named defendant, by his attorney, T. O. Abbott, and says that in the record and proceedings in the above-entitled matter, there is manifest error in this, that is to say:

I.

In overruling the demurrer of the defendant to the plaintiff's complaint, and entering judgment against the defendant in the sum of $88.30; which said order was entered herein on March 27, 1901.

II.

In sustaining the demurrer of the plaintiff, to the first affirmative defense set forth in the amended answer of defendant, which
51 said order was entered herein on the 10th day of July, 1901.

III.

In sustaining the motion of plaintiff to strike certain portions of the second affirmative defense and counter-claim set forth in the amended answer of defendant, which said order was entered herein on the 10th day of July, 1901.

IV.

In admitting upon the trial of the issues herein, the affidavit of Joseph G. Heim, dated October 1, 1901, and the exhibits thereto attached, all marked Plaintiff's Exhibit "B."

V.

In denying defendant's motion for a nonsuit, at the close of plaintiff's proof upon the trial of the issues herein.

VI.

In refusing upon the said trial, to admit on behalf of the defendant, at said trial, a certified copy of the petition and order in the matter of Jos. G. Heim, as receiver of the First National Bank of South Bend, Washington, for authority to compromise and sell the remaining assets of said fund in liquidation, marked as Defendant's Identification "1"; and also the order confirming the sale of said assets, marked as Defendant's Identification "2."

VII.

In denying defendant's motion for judgment, made at the close of the said trial, and in rendering a decision in favor of the plaintiff.

52 VIII.

In entering the findings of fact and conclusions of law offered by the plaintiff, and in refusing to enter those offered by the defendant.

IX.

In entering the final order for judgment against the defendant, and in favor of the plaintiff, in the sum of three thousand one hundred eighty-three and seventeen one-hundredths dollars ($3,183.17); which said order was entered December 4, 1901.

Wherefore, the said Adolphus F. McClaine prays that the various orders aforesaid and each of them, be reversed, and that said court be ordered to dismiss him hence without day and award him costs and damages, according to event.

T. O. ABBOTT,
Attorney for Defendant.

Received copy of the foregoing assignment of errors, this 28th day of December, 1901.

HUDSON AND HOLT,
Attorneys for Plaintiff.

PLAINTIFF'S EXHIBIT "B."

(Exhibit "B" to affidavit of Joseph G. Heim, taken by me this, the 1st day of Oct., 1901. John T. Welsh, notary public.)

Registry Return Receipt Card.

Cancellation stamp: "Tacoma, Wash., Sept. 3, '96, 10 p. m."
53 Receiving stamp: "South Bend, Wash., Sep. 4, '96, 7 p. m."

Postoffice Department.

Official business.

Name of sender: J. G. Heim, South Bend, Wash.
Registry return receipt sent 9–2, 1896.
Reg. No. 112, from postoffice at South Bend, Wash.
Letter addressed to A. F. McLaine, Tacoma, Wash.
Received the above-described letter.

A. F. McCLAINE.
MAE U. McCLAINE.

No. 4467.

Treasury Department, office of the Comptroller of the Currency.

WASHINGTON, *August* 17, 1896.

In the Matter of the FIRST NATIONAL BANK OF SOUTH BEND, WASHINGTON.

To all whom it may concern:

Whereas, upon a proper accounting by the receiver heretofore appointed to collect the assets of "The First National Bank of South Bend," Washington, and upon a valuation of the uncollected assets remaining in his hands, it ap-ears to my satisfaction that in order to pay the debts of such association it is necessary to enforce the individnal liability of the stockholders therefor to the extent hereinafter mentioned, as prescribed by section 5151 and 5234 of the Revised Statutes of the United States.

54 Now, therefore, by virtue of the authority vested in me by law, I do hereby make an assessment and requisition upon the shareholders of the said "The First National Bank of South Bend" for fifty thousand dollars to be paid by them ratably on or before the seventeenth day of September, 1896, and I hereby make demand upon each and every one of them for one hundred dollars upon each and every share of the capital stock of said asso-

ciation held or owned by them, respectively, at the time of its failure; and I hereby direct Joseph G. Heim, the receiver heretofore appointed, to take all necessary proceedings, by suit or otherwise, to enforce to that extent the said individual liability of the said shareholders.

In witness whereof, I have hereto set my hand and caused my seal of office to be affixed to these presents, at the city of Washington, in the District of Columbia, this seventeenth day of August, A. D. 1896.

[SEAL.] GEO. M. COFFIN,
Deputy and Acting Comptroller of the Currency.

(Exhibit "A" to affidavit of Joseph G. Heim, taken by me this, the 1st day of October, 1901. John T. Welsh, notary public.)

Office of the receiver of the First National Bank of South Bend, Washington.

SOUTH BEND, WASHINGTON, *August* 17, 1896.

You will please take notice, that the Comptroller of the Cur-
55 rency has levied an assessment upon the stockholders of the First National Bank of South Bend, Washington, of one hundred dollars ($100.00) a share, payable at the office of the receiver, on or before September 17, 1896. The receiver is, however, authorized by the comptroller to grant an extension without interest, to shareholders who pay 25 per cent. of the assessment on or before that date, and who will give a written obligaton, satisfactorily guaranteed to pay 25 per cent. additional on or before October 17, 1896, 25 per cent. on or before November 17, 1896, and the remaining 25 per cent. on or before December 17, 1896.

You are therefore requested to pay the assessment on 25 shares of stock standing in your name, in accordance with the foregoing order and this notice, or suit will be commenced to enforce payment.

JOSEPH G. HEIM,
Receiver First National Bank of South Bend, Wash.

To A. F. McClaine, Tacoma, Washington.

(Title of Court and Cause.)

Affidavit of Joseph G. Heim.

STATE OF WASHINGTON, } *ss:*
County of Pacific, }

Joseph G. Heim, being by me the undersigned, a notary public in and for said State of Washington duly sworn deposes and says: That he was duly appointed receiver of the First National Bank of South Bend, Washington, and became such on August 17th, 1895, and acted as such for more than three years thereafter.

56 That on the 12th day of September, 1896, at South Bend, Washington, he mailed by registered letter to A. F. McClaine, the defendant in the aforesaid action, in a sealed envelope, addressed to said A. F. McClaine at Tacoma, Washington, his then residence and postoffice address, postage prepaid, a printed document, a copy of which is attached hereto and marked Exhibit "A" to this affidavit, consisting of two parts, namely, the action of the deputy and acting Comptroller of the Currency, Geo. M. Coffin, relative to an assessment against the stockholders of the First National Bank of South Bend, Washington, and styled "In the matter of the First National Bank of South Bend, Washington," dated August 17, 1896, and also a notice to the stockholders of said bank of said assessment and a demand for the payment thereof, said notice and demand being signed by affiant as receiver as aforesaid, and was dated August 17, 1896, and said notice at the bottom thereof was addressed to A. F. McClaine, Tacoma, Washington; and both of said parts were printed, except that in the notice a blank as to the number of shares had written therein with pen and ink, the figures "25," and the name of affiant was signed thereto by affiant with pen and ink, "Joseph G. Heim," and the name of "A. F. McClaine, Tacoma, Washington," at the foot of said notice, was written with pen and ink by this affiant;

That affiant received a receipt through the postoffice at South Bend, Washington, for said registered letter, which receipt is attached hereto and marked Exhibit "B";

57 That affiant did both prior and subsequent to the mailing of said document make personal demand upon said McClaine for the payment of said assessment, the exact dates of which affiant cannot now remember; that said McClaine, in his conversation with said affiant admitted having received said document, having knowledge thereof and of said assessment and of said demand;

That said McClaine paid affiant, as receiver as aforesaid, the sum of two hundred dollars by check, and the further sum of two hundred dollars by conveyance of lots three and four in block twenty-seven, corrected plat of South Bend, on account of and in connection with said liability on said assessment; and affiant never received from him, or anyone else for him, nor did he ever pay affiant any other sum or amount, either in money or otherwise, directly or indirectly, on account of or in connection with said assessment, or the claim against said McClaine for the same.

JOSEPH G. HEIM.

Subscribed and sworn to before me this the 1st day of October, A. D. 1901.

[SEAL.] JOHN T. WELSH,
Notary Public for the State of Washington,
Residing at South Bend, Washington.

(Title of Court and Cause.)

Stipulation.

It is hereby stipulated by and between the parties hereto through their respective attorneys that the annexed affidavit is the affidavit of Joseph G. Heim, and that the same was taken on October
58 1st, 1901, before John T. Welsh, notary public; and further, that the exhibits thereto attached and marked Exhibits "A" and "B" are the exhibits referred to in said affidavit; and it is further stipulated that the said Heim would, if he were present, testify as set forth in said affidavit; and it is further stipulated that the said affidavit and exhibit may be offered in evidence by the plaintiff in all respects as if the same had been taken upon commission duly issued, or as if the said Heim were present in court, the defendant reserving the right to object to said testimony upon the ground of the irrelevancy, incompetency, or immateriality thereof, but hereby waiving all right to object to the same by reason of the manner in which it was taken,

Dated Tacoma, Washington, October 3d, 1901.

HUDSON & HOLT,
Attorneys for Plaintiff.
T. O. ABBOTT,
Attorney for Defendant.

59 DEFENDANT'S EXHIBIT "B."

In the Circuit Court of the United States for the District of Washington, Western Division.

JOSEPH G. HEIM, as Receiver of the First National Bank of South Bend, Washington, Plaintiff,
vs.
A. F. MCCLAINE and MAE U. MCCLAINE, His Wife, Defendants.
No. 588.

Complaint.

The above-named plaintiff, as receiver of the First National Bank of South Bend, Washington, complains of the said defendants, and alleges:

1.

That the First National Bank of South Bend, Washington, is and was at all times herein mentioned a banking corporation organized under the laws of the United States, and doing business before its suspension at South Bend, in the aforesaid district.

2.

That said First national bank being insolvent closed its doors and suspended business on the 10th day of August, 1895, and the Comptroller of the Currency of the United States having ascertained and determined that the said bank was insolvent, on the 17th
60 day of August, 1895, duly appointed Joseph G. Heim, the plaintiff, the receiver of the said First national bank, and said Joseph G. Heim is now and has been since August, 1895, the duly appointed, acting and qualified receiver of said corporation under and by virtue of the laws of the United States providing for the appointment of receivers of national banking associations.

3.

That on the 17th day of August, 1896, the deputy and acting Comptroller of the Currency of the United States, having first ascertained and determined that the assets, property, and credits of the said First national bank were wholly insufficient to pay its debts and liabilities, and that it was necessary to the complete and entire administration of the trust reposed in him, and in order to pay the liabilities of said banking association, that recourse should be had to the personal liability imposed upon the stockholders of said bank by the statutes in such cases made and provided, levied an assessment and made a requisition upon the shareholders of the said "The First National Bank of South Bend," for fifty thousand dollars, to be paid by them ratably, on or before the 17th day of September, 1896, and made a demand upon each and every one of said shareholders for one hundred dollars ($100) on each and every share of the capital stock of said corporation held or owned by them respectively at the time of its failure.

61 4.

That the said deputy Comptroller of the Currency, by written order, dated seventeenth day of August, 1896, and under his seal of office, directed this plaintiff as said receiver to take all necessary proceedings by suit or otherwise to enforce the liability of the said stockholders to the extent of one hundred dollars ($100) upon each and every share of the said capital stock held or owned by them respectively at the date of the suspension of said bank.

5.

That at the date of the failure of said bank, the defendant, A. F. McClaine, was the owner of twenty-five (25) shares of the capital stock of said bank, of the par value of one hundred dollars ($100) per share, and the same stood in his name as such owner upon the books of the said association at said time, and said defendant is now and ever since has been the owner of the same; and said defendant has had notice of the foregoing order of the said deputy Comptroller of the Currency.

6.

That this plaintiff duly demanded of the said defendant, A. F. McClaine, the payment of said assessment upon the said stock, and said defendant was notified that in the event such payment was not made on or before the 17th day of September, 1896, suit would be commenced to enforce the payment thereof.

7.

That the said defendants are residents and citizens of the aforesaid district of Washington, and western division thereof,
62 being citizens and residents of the city of Tacoma, Pierce county, Washington.

8.

That at the time said defendant, A. F. McClaine, subscribed and secured the said shares of stock of said banking association and now and ever since said date, he and the defendant, Mae U. McClaine, were husband and wife, and that said subscription and said ownership of said stock was and is for the benefit of the community then existing between said A. F. McClaine and Mae U. McClaine, his wife, and was made by the husband in the prosecution of the community business.

9.

That plaintiff did subsequently to the 17th day of September, 1896, begin an action against said defendants on the said claim, in the superior court of the State of Washington, for Pierce county, being case No. 16,663 in said court, and that subsequently to the bringing of said action the said defendant A. F. McClaine, made a written proposition to said plaintiff to settle said claim, upon the following terms, to wit:

That the said defendant, would pay $200 thereon, and that said action be dismissed, and he would then pay the balance as follows:

$425.....May 1st, 1897.
$625.....August 1st, 1897.
$625.....November 1st, 1897.
$625.....February 1st, 1898.

And said proposition was duly accepted by plaintiff.

63 10.

That the said defendant made the first payment of $200 thereon on or about the 20th day of April, 1897, and also a further payment of $200 on or about the 21st day of May, 1897; but has wholly failed to make any other or further payments on said settlement.

11.

That said action was duly dismissed on the 10th day of March, 1898, and is no longer pending against said defendants; that this

plaintiff was duly authorized to make the said settlement with the said defendant by the Comptroller of the Currency.

Therefore the plaintiff prays for judgment against the said A. F. McClaine in the sum of twenty-one hundred dollars ($2100), with interest on $225 thereof from May 1st, 1897, on $625 thereof from August 1st, 1897, on $625 thereof from November 1st 1897, and on $625 thereof from February 1st, 1898, at the rate of seven (7) per cent per annum, and for his costs and disbursements herein, and that the judgment herein be declared a charge upon the community property of the said A. F. McClaine and Mae U. McClaine.

BONEY & HOYT,
Attorneys for Plaintiff.

Office and P. O. address, No. 526 the Rookery, Spokane, Washington.

HUDSON & HOLT,
Attorneys for Plaintiff.

Office and P. O. address, No. 403–4–5 Berlin building, Tacoma, Washington.

64 In the Circuit Court of the United States for the District of Washington, Western Division.

JOSEPH G. HEIM, as Receiver of the First National Bank of South Bend, Washington, Plaintiff,
vs.
A. F. MCCLAINE and MAE U. MCCLAINE, His Wife, Defendants. } No. 588.

Separate Amended Answer of A. F. McClaine.

Comes now the defendant, A. F. McClaine and for his separate answer to the complaint herein, saving all rights herein, says:

I.

He admits the allegations of paragraph 1 of said complaint.

II.

He admits the allegations of paragraph 2 of said complaint.

III.

He admits the allegations of paragraph 3 of said complaint.

IV.

He admits the allegations of paragraph 4 of said complaint.

65

V.

He admits the allegations of paragraph 5 of said complaint.

VI.

He admits the allegations of paragraph 6 of said complaint.

VII.

He admits the allegations of paragraph 7 of said complaint.

VIII.

He denies the allegations of paragraph 8 of said complaint, except that he admits that at the time he subscribed for and secured said stock in said banking association, and now, and ever since said date he and the defendant, Mae U. McClaine, were and are husband and wife.

IX.

He admits that the plaintiff did, as alleged in paragraph 9 of said complaint, subsequently to the 17th day of September, 1896, begin an action against said defendants on the said claim, in the superior court of the State of Washington, for Pierce county, and that subsequently to the bringing of said action, this answering defendant made a written proposition, and that said proposition was accepted by said plaintiff; but he denies each and every other allegation in said paragraph 9.

X.

He denies the allegations of paragraph 10 of said complaint.

66

XI.

He admits the allegations of paragraph 11 of said complaint, except that said action was duly dismissed on the 10th day of March, 1898, and is no longer pending against said defendants, which he denies.

And for a first separate and affirmative defense to the allegations of said complaint, this defendant alleges as follows, to wit:

I.

That on or about the 5th day of April, 1897, the plaintiff herein brought an action in the superior court of the State of Washington for Pierce county, against the defendants herein upon account of the assessment or alleged assessment set forth in the complaint herein, by serving upon said defendants a copy of the original summons and complaint in said action.

II.

That on or about the 8th day of April, 1897, and before the original summons and complaint in said action had been filed with the

clerk of said court, this defendant, by way of compromise, made a certain proposal in writing to said plaintiff for the dismissal of said action, as follows, to wit: That in consideration of the immediate dismissal of said action this defendant would sell and deed to said plaintiff, those certain premises known and described as lots 3 and 4, block 37, corrected plat of South Bend, at the agreed price of $415.83, the sum of $215.83 thereof to be applied in payment of another claim held by said plaintiff (amounting to said sum of $215.83,
67 and the sum of $200 thereof to be credited upon said stock as assessment (the same being the stock assessment referred to in the complaint herein), and thereafter said proposition was duly accepted by said plaintiff.

III.

That on or about the 29th day of April, 1897, this defendant relying upon the good faith and honesty of said plaintiff, and believing that he would faithfully carry out said agreement, did make, execute and deliver to said plaintiff the deed as aforesaid to said premises, and said plaintiff did accept said deed, and has ever since had the use and benefit of said premises.

IV.

That contrary to said agreement and in violation thereof, the said plaintiff did not dismiss said action, but did subsequently, to wit, on the 30th day of December, 1897, file the original of said summons and complaint, with the clerk of said court, and did apply for and obtain a default against said defendants and did apply for and obtain a judgment against said defendants, according to the prayer of the complaint.

V.

That said default and judgment was taken without any notice to this defendant; that immediately upon learning that said judgment had been entered as aforesaid, this defendant did apply for the vacation thereof, and for leave to appear and defend against said action and that plaintiff was duly served with a notice of said application, and did appear before said court and did resist said applica-
68 tion upon the merits thereof; and said court on the 21st day of February, 1898, after hearing the evidence produced by both parties upon the merits of said application and the argument of counsel thereon, and being fully advised, did find that the entering of said judgment was contrary to agreement and in violation thereof, and did order said judgment vacated and set aside and declared of no effect and void.

VI.

That the full and fair value of the premises hereinbefore de-cribed, at the time of the agreement hereinbefore referred to, was the sum of twelve hundred dollars.

VII.

That on account of said wrongful taking and entering of said judgment, this defendant was compelled to expend in attorneys' fees the sum of one hundred dollars.

VIII.

That by reason of the violation of said agreement as aforesaid and of the loss of the fair and reasonable value of said premises as aforesaid and of the expenditure on account of attorneys' fees as aforesaid, the purpose and effect of said compromise was wholly lost to this defendant and he was and is injured thereby in the sum of thirteen hundred dollars.

And as a second separate and affirmative defense to the allegations of said complaint, answering, defendant alleges as follows:

That the plaintiff is not now the owner and holder of said
69 alleged claim set forth in the complaint herein, and was not such owner at the time this action was brought; but that he has assigned all his interest in the same, for a valuable consideration, and is not the real party in interest herein.

Wherefore, answering defendant prays:

1. That he be dismissed hence without day.

2. That the defendant do have and recover judgment against the plaintiff, as damages in the sum of thirteen hundred dollars ($1300), and that an order of this court do issue to said receiver directing him to withhold from sale and disposition the premises hereinabove described, subject to the further order of this court.

For such other and further relief as to the court shall seem equitable and just.

T. O. ABBOTT,
Attorney for Defendant, 520–21 *Fidelity Building, Tacoma, Washington.*

STATE OF WASHINGTON, } ss:
County of Pierce, }

A. F. McClaine, being first duly sworn, does on oath depose and say that he is one of the defendants in the foregoing entitled action; that he has read the foregoing answer knows the contents thereof and believes the same to be true.

A. F. McCLAINE.

Subscribed and sworn to before me this 3d day of Jan. 1890.

_____,
Notary Public Residing at Tacoma, Pierce County, Wash.

70 In the Circuit Court of the United States for the District o
Washington, Western Division.

JOSEPH G. HEIM, as Receiver of the First National Bank of South Bend, Washington, Plaintiff,
vs.
A. F. MCCLAINE and MAE U. MCCLAINE, His Wife, Defendants.
No. 588

Motion.

Now come Hudson & Holt, attorneys for the plaintiff in the above entitled action, and move the court for an order substituting the name of J. Frank Aldrich for the name of Joseph G. Heim, plaintiff in this action, and for an order reviving said action in the name of the said J. Frank Aldrich, as receiver of the First National Bank of South Bend, Washington, which motion is based upon the certificate of the deputy and acting Comptroller of the Currency of the United States.

HUDSON & HOLT,
Attorneys for Plaintiff.

71 In the Circuit Court of the United States for the District of
Washington, Western Division.

JOSEPH G. HEIM, as Receiver of the First National Bank of South Bend, Washington, Plaintiff,
vs.
A. F. MCCLAINE and MAE U. MCCLAINE, His Wife, Defendants.
No. 588.

Order.

On motion of Hudson & Holt, attorneys for the plaintiff in this action, for leave to substiute the name of J. Frank Aldrich, as receiver of the First National Bank of South Bend, Washington, in the place of Joseph G. Heim, the plaintiff in this action, and to revive the said action in the name of said J. Frank Aldrich; and the court being satisfied from the showing made that the said Joseph G. Heim has resigned his office of receiver of the First National Bank of South Bend, Washington, and that his resignation has been accepted, and that J. Frank Aldrich has been duly appointed his successor as such receiver, and is now such receiver; it is therefore,

Ordered that the name of J. Frank Aldrich be substituted as plaintiff in this action for that of Joseph G. Heim, and that said action be revived in the name of said J. Frank Aldrich as receiver of
72 the First National Bank of South Bend, Washington, as plaintiff in this action; and that said action be proceeded with

under the style of J. Frank Aldrich, as receiver of the First National Bank of South Bend, Washington, plaintiff, *vs.* A. F. McClaine and Mae U. McClaine, his wife, defendants.

Ordered this the — day of February, 1899.

—— ——, *Judge.*

In the Circuit Court of the United States for the District of Washington, Western Division.

J. Frank Aldrich (Substituted Plaintiff for Joseph G. Heim), as Receiver of the First National Bank of South Bend, Washington, Plaintiff,
vs.
A. F. McClaine and Mae U. McClaine, His Wife, Defendants. } No. 588.

Amended Reply to the Separate Answer of Defendant A. F. McClaine.

Now comes the plaintiff in this action, and for amended reply to the first separate and affirmative defense in the answer of the said defendant, A. F. McClaine, alleges as follows:

1. He admits the allegations contained in paragraph one.

73 2. He denies each and every the allegations contained in paragraph two, except the fact that a proposition of compromise was made by the said defendant on or about the date named, and that two hundred dollars was to be paid on the settlement proposed by conveyance of real estate.

3. He denies each and every the allegations contained in paragraph three, except the execution of the deed, and that the plaintiff has been in possession of the said premises conveyed by said deed.

4. He admits the allegations contained in paragraph four.

5. He admits the allegations contained in paragraph five, except the allegation that said default and judgment were taken without any notice to the said defendant.

6. He denies the allegations contained in paragraph six.

7. He denies the allegations contained in paragraph seven.

8. He denies the allegations contained in paragraph eight.

And for a further reply to the allegations contained in the second separate and affirmative defense of said answer, plaintiff alleges and says:

1. He denies each and every the allegations contained in said second separate and affirmative defense.

Wherefore, plaintiff demands judgment as prayed for in the complaint herein.

HUDSON & HOLT,
Attorneys for Plaintiff.

74 STATE OF WASHINGTON, } ss:
County of Pierce, }

R. G. Hudson, being first duly sworn, on oath deposes and says: That he is one of the attorneys for the plaintiff in the above-entitled action; that he has read the foregoing amended reply and knows the contents thereof, and that he believes the same to be true.

That he makes this affidavit because the plaintiff is now absent from the said county and State.

R. G. HUDSON.

Subscribed and sworn to before me this 28th day of June, 1899.

[NOTARIAL SEAL.] R. S. HOLT,
Notary Public in and for said State,
Residence at Tacoma, in said County.

In the Circuit Court of the United States for the District of Washington, Western Division.

J. FRANK ALDRICH (Substituted Plaintiff for Joseph G. Heim), as Receiver of the First National Bank of South Bend, Washington, Plaintiff,
vs.
A. F. McCLAINE and MAE U. McCLAINE, His Wife, Defendants. } No. 588.

Journal Entry.

(July 26, 1899.)

75 This cause came on regularly for hearing at this time upon motion of defendants for judgment upon the pleadings. Mr. R. G. Hudson appearing for the plaintiff and Mr. T. O. Abbott on behalf of the defendants, and was argued by counsel and the court being fully advised in the premises ordered that said motion be and the same is hereby denied. To which ruling defendants except and their exception is allowed.

Thereupon a jury having been waived, the cause was duly submitted to the court, and thereafter the plaintiff moves the court for a voluntary nonsuit herein, and the court being duly advised, in the premises, orders that said motion be and the same is hereby granted.

DEFENDANT'S EXHIBIT "C."

(Title of Court and Cause.)

Stipulation.

It is hereby stipulated and agreed by and between the parties hereto, through their respective attorneys, that the annexed is a true and correct copy of the original letters therein referred to and set out.

HUDSON & HOLT,
Attorneys for Plaintiff.
T. O. ABBOTT,
Attorney for Defendant.

TACOMA, WASH., *April 8th*, 1897.

Joseph G. Heim, Esq., receiver, South Bend, W'n.

DEAR SIR: Regarding the assessment of 100 % upon the stock held by me in the First National Bank, of South Bend, I have
76 the following proposition to submit as to the payment of the amount $2,500 and the overdraft account of J. W. Morgan:

I will sell and deed to you lots Nos. 3 & 4, block 27, corrected plat of South Bend, in payment of the amount of the overdraft above mentioned, to wit, $215.83, and $200 additional to be credited upon my stock assessment; you to dismiss the suit brought against myself and wife, and I make the following proposition as to the payment of the balance: I will pay on May 1st, 1897, $425, on August 1st, 1897, $625, on November 1st, 1897, $625, and on February 1st, 1898, $625.

This I think you will admit is a favorable proposition under the circumstances, and owing to the financial condition existing here I find myself unable to complete these payments in any shorter period. Kindly advise me as early as possible in relation to the above.

Very truly yours, A. F. McCLAINE.

SOUTH BEND, WASH., *April 22nd*, 1897.

Mr. A. F. McClaine, Tacoma, Wash.

DEAR SIR: Yours of the 16th is at hand. Herewith I enclose you deeds for lots 4 & 5, of block 27, corrected plat of South Bend, Wash., for you and your wife to sign. Upon the return to me of the deed properly executed, and the receipt of $425.00 by May 1st. next I will send you a receipt for the Morgan overdraft and give you credit for $625.00 upon your assessment, and will make a recommendation to the comptroller that your proposition of 4-8-97 be accepted, and will instruct my attorneys to hold in abeyance, or dismiss the suit.

77 If the proposition is not accepted by the comptroller, I will return you the deed unrecorded, also, the money,—$425.00.

Your proposition having been made good by the first payment will undoubtedly have great weight with the comptroller in determining him to accept the proposition.

Very truly, JOSEPH G. HEIM, *Receiver.*

TACOMA, WASH., *April* 29, 1897.

Joseph G. Heim, Esq., So. Bend, W'n.

DEAR SIR: Herein deed to lots 4 & 5 bl'k. corrected plat of So. Bend as per our arrangement verbal and my proposition of Apr. 8–97. As this has been delayed so much I will not now be able to complete 1st payment until May 10–1897 as I have had to use some of my funds in another direction. I hope this will be satisfactory.

Yours truly, A. F. McCLAINE.

TACOMA, WASH., *May* 2, 1897.

Joseph G. Heim, recvr., So. Bend, Wash.

DEAR SIR: Herein my ck. No. 7 for $200—on acc't of payment due May 10th. Will be able to remit balance shortly. Have only just returned from Oregon and find your letter *re* safe here. Will forward same to my parties & ask for instructions.

Yours truly, A. F. McCLAINE.

78 SOUTH BEND, WASH., *July* 19, 1897.

Mr. A. F. McClaine, Tacoma, Wash.

DEAR SIR: I have just returned home from a trip east whither I was recently summoned, and was disappointed to find that you had not yet completed the payment of the first 25% stock assessment. It is very unsatisfactory to make such slow progress, for I want to get the affairs of the bank closed up as soon as possible, but can't do it while these matters are pending. I hope to have a remittance from you for the balance of the first installment as soon as you can send it.

Very truly, JOSEPH G. HEIM, *Receiver.*

TACOMA, WASHINGTON, *July* 23, 1897.

Jos. G. Heim, Esq., receiver, South Bend, Wash.

DEAR SIR: Mr. McClaine has referred to me, as his attorney, your letter of 19th relative to the assessment against him.

Since making the arrangement with you, the situation has very materially changed with Mr. McC. so that he is not able to carry out the same. Unless you can see your way clear to accept a cash compromise of the claim, he will be unable to do anything further in the matter in justice to other more equitable and pressing obligations. I think a fair adjustment would be largely for the benefit of

your trust, as a suit and judgment would not avail you anything at present.

If you think favorably of cash compromise of the matter on
79 a fair basis I will come down to see you at the earliest date possible and if an agreement can be reached a settlement can *be made at once.*

Awaiting your early reply, I am,
Yours, etc., T. O. ABBOTT.

SOUTH BEND, WASH., *July 27th*, 1897.

Mr. T. O. Abbott, Tacoma, Wash.

DEAR SIR: Yours of the 23rd in the matter of the assessment against stock in the First National Bank of South Bend owned by Mr. A. F. McClaine, is at hand and contents noted. Mr. McClaine and I compromised this matter once, I accepting the terms proposed by himself after having submitted it to the comptroller for his sanction, and I doubt that I would now be justified in accepting anything less. I do not know what you might consider a fair basis of settlement. I would consider the payment of the principal, the interest being remitted, a fair settlement; so that if you differ widely from that we would probably not reach conclusions together.

What do you consider a fair basis of settlement? It would be well for us to have some idea of whether we could come together at all before your being at the expense of a trip here in the matter.

Very truly, JOSEPH G. HEIM, *Receiver.*

TACOMA, WASH., *July* 31, 1897.

Joseph G. Heim, Esq., South Bend, Wash.

DEAR SIR: Replying to yours of 27th instant relative to the McClaine assessment, I note what you say about having com-
80 promised the matter formerly with Mr. McC. and your suggestion of payment of principal, the interest being remitted, as a fair settlement. Since the former arrangement the situation has very materially changed with Mr. McC. and he is not now in a position to carry out that arrangement, nor such a one as you now suggest. If this were the only matter requiring his attention the difficulty would not be so great, but it is now a question of what he can do and not what he wishes to do or ought to do. Other settlements have been made and are in process on a basis of 25 % and we think under the circumstances that would be a fair settlement in your case.

You will of course understand that obligations such as these do not have the same moral status that those of a more direct character do, and that Mr. McC. would not be justified in making a preference in this instance. Therefore, while the amount proposed may not seem fair to you, it must be borne in mind that a compromise would be a yielding on both sides and not on one alone. Mr. McC. has already attempted in good faith to carry out his former arrangement.

The question now is, is a suit and judgment likely to serve the trust better than a cash settlement such as proposed? I know that your own good business sense and knowledge of the result of like proceedings in other trusts will convince you that the latter course is best. If this meets your approbation I will come to see you.

Respectfully, T. O. ABBOTT.

81 SOUTH BEND, WASH., *Aug. 9th*, 1897.

Mr. T. O. Abbott, Tacoma, Wash.

DEAR SIR: Yours of 30th ult. in the McClaine matter is at hand. I could not recommend to the comptroller a settlement of Mr. McClaine's liability for so small a per cent. as is offered by you. I regret to say that if the offer contained in your letter is the best that Mr. McClaine can or will do, I will be compelled to proceed with the suit.

Very truly, JOSEPH G. HEIM, *Receiver.*

SILVERTON, OREGON, *Aug.* 25, 1897.

Joseph G. Heim, So. Bend, Wash.

DEAR SIR: I have not yet been able to make arrangements *so I can the* proposition that we talked of when I was in So. Bend, but I will make the following $350-cash. 350. Jan'y 10, '98 and $350 April 1st, 1898, making a total of $1050. If this meets with your approval will send you c'k for cash payment in few days.

Yours truly, A. F. McCLAINE.

SOUTH BEND, WASH., *Oct. 4th*, 1897.

Mr. A. F. McClaine, Tacoma, Wash.

DEAR SIR: Your letter of the — containing proposition of settlement of your indebtedness upon stock assessment at 50 per cent. of the balance due is received, and if you will send me a certified check for the first $350.00, I will recommend to the comptroller a settlement upon that basis, the $350.00 not to be applied on the
82 settlement until it is sanctioned by the comptroller, if the said settlement is not so sanctioned the $350.00 to be subject to your order.

Very truly, JOSEPH G. HEIM, *Receiver.*

TACOMA, WASHINGTON, *October 4th*, 1897.

Jos. Heim, Esq., receiver nat'l bank, South Bend, Wash.

DEAR SIR: I am advised by Mr. McClaine that he submitted a proposition to you some weeks since for adjustment of the assessment matter, about which I had some correspondence with you, and that he has had no answer from you touching the same. I desire to protect his interests in the matter, and if it is your purpose to reject his offer and press the suit, I wish to make defense, and I

therefore request that you will advise me of your conclusions in the matter at an early date.

Yours, etc., T. O. ABBOTT.

TACOMA, WASHINGTON, *October* 12, 1897.

Jos. G. Heim, Esq., receiver, South Bend, Wash.

DEAR SIR: Not having heard from you in regard to the McClaine assessment, I advised him, as his attorney, to withdraw the offer he made you, by reason of its non-acceptance, so that he would not be further embarrassed by the uncertainty of the matter. I have just received from him (he being east of the mountains) your letter of the 4th instant, wherein you advise him of the conditional acceptance of his offer, the condition requiring further serious delay.

83 In the present status of his affairs, and in order for him to adjust all matters satisfactorily, not only with you, but with others, uncertainty is very unwise, and I have therefore advised him to make you the following offer, to be accepted or rejected at once, to wit: In consideration of the immediate cancellation of the claim, he will pay $500.00 in cash, in full settlement thereof.

You doubtless have full authority to compromise the matter on this cash basis, without reference to Washington. It is important both for Mr. Mc.'s interest and your own that this proposition be accepted, and I ask you for a reply by return mail.

Yours, etc., T. O. ABBOTT.

SOUTH BEND, WASH., *Oct. 15th*, 1897.

Mr. A. F. McClaine, Tacoma, Wash.

DEAR SIR: Having no reply as yet to my last letter, I write you this note to inquire the reason of not having received the remittance of $350.00 as per last agreement of settlement. Of course, as you know, the settlement of you- indebtedness upon the basis of $1150.00 in three equal installments is only an offer, and if you are to take advantage of it, you must meet the payments promptly.

Let me hear from you.

Very truly, JOSEPH G. HEIM, *Receiver.*

SOUTH BEND, WASH., *Oct. 25th*, 1897.

Mr. T. O. Abbott, Tacoma, Wash.

DEAR SIR: On Oct. 15th, 1897, I wrote Mr. McClaine in
84 reference to the settlement of his indebtedness on stock assessment as we had agreed upon, but have not yet heard from him. In the meantime your letter comes, written before Mr. McClaine could have received mine, with another proposition, being less than the proposition made directly by Mr. McClaine himself. I do not yet understand that Mr. McClaine does not intend to stand by the agreement he made with me, which was 50 % of the balance

due, and which I recommended as a basis of settlement. Your offer is considerably less than any of the other stockholders have escaped with, and less than that for which Mr. McClaine has settled with other banks. I am awaiting a reply from Mr. McClaine to my last letter.

Very truly, JOSEPH G. HEIM, *Receiver.*

TACOMA, WASH., *Nov.* 2, 1897.

Joseph G. Heims, Esq., receiver, South Bend, Wash.

DEAR SIR: Yours of the 25th inst. relating to the McClaine assignment is at hand. I think you have forgotten some of the previous correspondence touching this matter.

The letter to which yours was the answer, stated that Mr. McC. had forwarded to me your letter of the 4th inst., wherein you notify him for the first time of your conditional acceptance of his offer, in which you stated that it will be necessary to secure the sanction of the comptroller.

85 In view of the fact that Mr. McC.'s proposition was made to you some months since and that you did not even conclude to submit the same to the comptroller, until so recent a date, caused me to advise him to withdraw the same for nonacceptance. Your proposition of the 4th inst. still leaves the matter open for an indefinite period, and as I informed you in my last letter he is not justified in allowing the matter to longer remain in an uncertain state.

Therefore the proposition which I submitted to you to pay five hundred dollars ($500.00) cash in full settlement of the claim was based upon the necessity of having the matter determined at once.

I also have from Mr. McC. your letter of October 15th, and the entire correspondence is before me, upon final consideration of the matter, I do not think it advisable for him to offer anything different from my proposition as above stated.

If you desire to accept this, the cash will be paid at once upon proper discharge of the obligation.

Mr. McC. has no disposition whatever, to go back on any agreement he has made with you, but the difficulty is that you have not signified your acceptance of any proposition submitted, until too late and then only conditional.

He has made no other settlements but other propositions are still pending and considering the fact that he has already made you one substantial payment upon this assessment, which added to the amount he now proposes to pay will be extremely fair under

86 all the circumstances, and I hope that you will favor me with an early reply accepting this proposition, so that the matter may be closed at once.

Yours respectfully, T. O. ABBOTT.

DEFENDANT'S IDENTIFICATION No. 1.

UNITED STATES OF AMERICA, }
State of Washington. }

In the Circuit Court of the United States for the District of Washington, Western Division.

In the Matter of the Application of JOSEPH G. HEIM, Receiver of the First National Bank of South Bend, Washington, for Authority to Compromise and Sell the Remaining Assets of said Bank in Liquidation.

Petition.

To the Honorable C. H. Hanford, judge of said court:

Your petitioner, Joseph G. Heim receiver of the First National Bank of South Bend, Washington, respectfully represents to your honor that heretofore and prior to the 10th day of August, A. D. 1895, the First National Bank of South Bend, Washington, aforesaid, was an association duly organized and existing under and by virtue of the laws of the United States regulating and concerning the existence of national banks, and was doing business as a national bank at said South Bend, Washington; that on said
87 tenth day of August, A. D. 1895, said bank failed and closed its doors, having on said date and theretofore committed acts of bankruptcy, and thereafter on the 17th day of August, 1895, the Comptroller of the Currency, having become satisfied of the insolvency of said association, appointed your petitioner receiver of said First National Bank of South Bend, Washington, and your petitioner thereupon duly qualified, entered upon the discharge of his duties as such receiver, took possession of the assets of said bank and ever since has been in possession thereof, and has been and is now administering the affairs of said trust.

Your petitioner further represents that there is now remaining in his hands a large amount of the assets of said trust, consisting of bills receivable, overdrafts, judgments, stocks, and securities, claims due upon the assessment of the capital stock of said bank, other personal and chattel property and evidences of indebtedness. That your petitioner has, after exhausting all means of collection, been unable to realize upon said assets, which your petitioner is informed and believes are bad and doubtful assets.

Your petitioner further represents that a considerable sum can be realized from such assets by compromising and compounding the same with the debtors or by private sale thereof.

Your petitioner further represents that said bank had, prior to suspension, and the trust has subsequent thereto, through its re-

ceiver, in the administration of the affairs thereof, acquired
88 title to and interest in certain lots and tracts of real estate
located and being in the county of Pacific, State of Washington, and your petitioner believes it to be to the best interest of said trust that such real estate be sold for cash privately or at public auction, and, if sold publicly, after giving due notice of such sale according to law, which said real estate is more particularly known and described as follows:

Lot 10, block 19; lots 3 and 4, block 27; lot 8, block 32; lot 6, block 35, corrected plat of South Bend, Washington. Lot 16, block 40, South Bend Land Company's second addition to South Bend, Washington. Lots 2 and 8 of sec. 28 of township 14, N. R. 9 W., W. M. except 15 acres off south side of said lot 8. Southwest quarter, sec. 32, township 14, N. R. 9 W. M. And lot 16, block 20, South Bend addition to South Bend, Washington.

Your petitioner further represents that an examination of the condition of the affairs of said receivership has been made by a special national bank examiner, under the authority and direction of Hon. James H. Eckels, Comptroller of the Currency and that all of the remaining assets of said trust are bad and doubtful, and it is the desire of the said Comptroller of the Currency that said receivership be closed at an early date, and that said comptroller has directed and authorized your petitioner to apply to this honorable court for an order authorizing and empowering your petitioner as such receiver, to compromise and compound or sell at private sale all of the assets of said trust and to sell at public sale all of the remaining assets thereof, except such as may be compounded or sold at private sale for cash, after duly advertising the sale at public
auction pursuant to law.

89 Your petitioner therefore prays this honorable court for an order authorizing, empowering, and directing him, as such receiver, to compromise and compound or sell at private sale all of the assets of the said First National Bank of South Bend Washington, now in his hands, as receiver aforesaid, for cash, for such sum or sums as in his judgment is to the best interest of his said trust, and to sell at public sale all of the assets not so compounded or sold at private sale, for cash; after duly advertising the same according to law.

And your petitioner further prays for such other and further order in the premises as to your honor may seem meet, etc.

JOSEPH G. HEIM,
Receiver First National Bank, South Bend, Washington.

STATE OF WASHINGTON, } ss:
County of Thurston, }

Joseph G. Heim, being first duly sworn on oath, says: That he is a receiver of the First National Bank of South Bend Washington; that he has read the foregoing petition, knows the contents thereof,

and that the same is true in substance and fact, as he verily believes.

JOSEPH G. HEIM.

Subscribed and sworn to before me this 30th day of September, A. D. 1897.

[Seal of Notary Public, C. J. Lord.]

C. J. LORD,
Notary Public in and for the State of Washington, Residing at Olympia.

90 THE UNITED STATES OF AMERICA, }
State of Washington, }

In the Circuit Court of the United States for the District of Washington, Western Division.

In the Matter of the Application of JOSEPH G. HEIM, Receiver of the First National Bank of South Bend, Washington, for Authority to Compromise and Sell the Remaining Assets of said Bank in Liquidation.

Order.

Upon reading the petition of Joseph G. Heim, receiver of the First National Bank of South Bend, Washington, duly verified on the 30th day of September, A. D. 1897, in the matter of the compromise and sale of the assets of said bank, in liquidation, and being fully advised in the premises, the court doth hereby order, adjudge, and decree that said Joseph G. Heim as receiver aforesaid, be and he is hereby authorized to compromise and compound or sell at private sale all of the assets of said bank, consisting of bills receivable, judgments, overdrafts, stocks and securities, claims due upon assessment of the capital stock of said bank, other personal and chattel property and evidences of indebtedness, and real estate, for cash, for such sum or sums as he as such receiver may be able to obtain and is in his judgment to the best interest of his said trust, and sell at public sale all
of the remaining assets of said trust not so compromised or
91 sold at private sale, together with the real estate described in said petition, not sold privately, namely:

Lot 10, block 19; lots 3 and 4, block 27; lot 8, block 32; lot 6, block 35, corrected plat of South Bend, Washington.

Lot 16, block 40, South Bend Land Company's second addition to South Bend, Washington.

Lots 2 and 8 of section 28 of township 14, N. R. 9 W.; W. M., except 15 acres off south side of said lot 8.

Southwest quarter, section 32, township 14, N. R. 9 W., W. M.

Lot 16, block 20, South Bend addition to South Bend, Washington.

The sale at public auction to be made in the manner hereinafter provided, for cash, and the said receiver to execute and deliver to the purchasers of said property at private or public sale such deeds, conveyances, assignments and transfers as may be proper, upon payment to him of the amount for which the same is sold at private or public sale.

And the said receiver is further authorized and empowered to do any other act or thing which may be necessary to fully carry out the conditions and purposes of this order.

The court further orders that the receiver sell the said assets of said bank, if sold publicly, at the courthouse door in the city of South Bend, the county seat of Pacific county, Washington, at the lawful hour prescribed by statute, and that due notice of such sale at public auction be made by publication of the time, place,
92 and terms thereof in a newspaper published in the city of South Bend, for four successive weeks said notice of publication to contain a general statement of the personal property and a description in detail of the real estate so offered for sale, and the receiver will also mail circular copies of such notice, together with schedule in detail of all of the assets to be sold, to each of the creditors and shareholders of said bank, and post like notices in at least five of the most public places in the city of South Bend.

Dated this 6th day of October, A. D. 1897.

C. H. HANFORD,
Judge of said Court.

UNITED STATES OF AMERICA, }
District of Washington, } ss:

I, A. Reeves Ayres, clerk of the circuit court of the United States for the district of Washington, do hereby certify the foregoing to be a full, true, and correct copy of the petition and order filed in the within entitled matter, as the same remains on file in said court, at Tacoma, in said district.

Witness my hand and the seal of said circuit court, the twentieth day of November, 1901.

[SEAL OF THE COURT.] A. REEVES AYRES, *Clerk,*
By SAM'L D. BRIDGES,
Deputy Clerk.

92½ *Proceedings Had in the United States Circuit Court of Appeals for the Ninth Circuit.*

93 At a stated term, to wit: the October term A. D. 1901 of the United States circuit court of appeals for the ninth circuit, held at the court room, in the city and county of San Francisco, on Wednesday the tenth day of September in the year of our Lord one thousand, nine hundred and two.

Present: The Honorable William B. Gilbert, circuit judge, Hon-

orable Erskine M. Ross, circuit judge, Honorable William W. Morrow, circuit judge.

ADOLPHUS F. McCLAINE, Plaintiff in Error,
v.
J. FRANK ALDRICH, as Receiver of the First National Bank of South Bend, Defendant in Error. } No. 793.

Order of Substitution.

It appearing to the satisfaction of the court that J. Frank Aldrich has since the prosecution of the writ of error in this cause, resigned his position as receiver of the First National Bank of South Bend, Washington, and that George C. Rankin has been duly appointed his successor and is now the duly acting receiver of said bank, on application of Messrs. Hudson & Holt, attorneys for the defendant in error in the aforesaid cause, to have said Rankin substituted for the said Aldrich in all respects as a party to said cause.

It is therefore ordered that said Rankin be, and he is hereby, substituted for and in the place and stead of said Aldrich in this cause in all respects in which said Aldrich appears therein.

Ordered, in open court in the presence of counsel for both parties this 10th day of September, 1902.

94 At a stated term, to wit: the October term A. D. 1901 of the United States circuit court of appeals for the ninth circuit, held at the court room, in the city and county of San Francisco, on Wednesday the tenth day of September in the year of our Lord one thousand, nine hundred and two.

Present: The Honorable William B. Gilbert, circuit judge, Honorable Erskine M. Ross, circuit judge, Honorable William W. Morrow, circuit judge.

ADOLPHUS F. McCLAINE, Plaintiff in Error,
v.
GEORGE C. RANKIN, Successor to and Substituted for J. Frank Aldrich, as Receiver of the First National Bank of South Bend, Defendant in Error. } No. 793.

Order of Submission.

Ordered, cause argued by T. O. Abbott, Esquire, counsel for the plaintiff in error, and R. G. Hudson, Esquire, counsel for the defendant in error, and submitted to the court for consideration and decision.

95 In the United States Circuit Court of Appeals for the Ninth Circuit.

ADOLPHUS G. MCCLAINE, Plaintiff in Error,
v.
GEORGE C. RANKIN, as Successor to and Substituted for J. Frank Aldrich, as Receiver of the First National Bank of South Bend, Defendant in Error.

In error to the circuit court of the United States for the district of Washington, western division.

T. O. Abbott, attorney for plaintiff in error.
Robert G. Hudson and Robert S. Holt, attorneys for defendant in error.

Before Gilbert, Ross, and Morrow, circuit judges.

GILBERT, circuit judge, delivered the opinion of the court.

The receiver of the First National Bank of South Bend, Washington, brought an action against the plaintiff in error as a stockholder of said bank to recover a delinquent assessment. The cause was tried before the court without a jury, and judgment was rendered against the plaintiff in error for the sum of $2300, with interest and costs.

The plaintiff in error assigns as error that the circuit court overruled his demurrer to the complaint. It is contended that the complaint fails to state a cause of action, for the reason that it does not show the total amount of the capital stock of the insolvent
96 bank. We think the complaint is sufficient. While it does not in direct terms state the total amount of the capital stock, it sets forth facts from which it may be inferred. It alleges that the total assessment upon the shareholders was $50,000; that it was made ratably; that the assessment was $100 upon each share; that there were 500 shares, and that their par value was $100 each. From these averments it is plain that the capital stock was $50,000.

It is assigned as error that the court sustained the demurrer of the receiver to the first affirmative defense of the answer of the plaintiff in error. In that defense it was alleged that on December 30, 1897, the former receiver of said bank had commenced an action against the plaintiff in error in the superior court of the State of Washington for the county of Pierce, to recover the same assessment, and that a judgment was rendered therein in favor of said receiver for the amount of $2300, which judgment, upon the application of the plaintiff in error, was subsequently vacated and set aside; and that thereafter, upon the application of the receiver, the action was dismissed without notice to the plaintiff in error and "without prejudice;" that thereafter, on the application of the plaintiff in error and with the consent of counsel for the receiver, the

words "without prejudice" were struck from the judgment entry. It is contended that the judgment so pleaded in such affirmative defense constituted a bar to the present action, for the reason that the dismissal was not without prejudice, and was so entered with the consent of the receiver. By the provisions of sections 409 and 411 of 2 Hill's Code of Washington, it will appear that such a judgment of dismissal has not the effect which is contended for by the plaintiff in error, and that it is no bar to another action for the same cause.

It is contended that the court erred in admitting in evidence a certain exhibit which purported to be a copy of a notice
97 served by the former receiver upon the plaintiff in error. The complaint had alleged a notice of the assessment and demand for its payment given and made to the plaintiff in error by the receiver, and this was denied by the answer. The receiver, to prove his cause of action, introduced the affidavit of Joseph G. Heim, the former receiver of said bank, together with the exhibit attached thereto. It was stipulated between the parties that the affidavit of Heim might stand in said cause for and as the testimony of said Heim in all respects as if it had been taken upon commission duly issued, or as if he were present in court, the plaintiff in error reserving an objection thereto on the ground or irrelevancy, immateriality, and incompetency only. It is contended now that the exhibit was incompetent testimony, for the reason that it was not the best evidence; that no notice or demand was served upon the plaintiff in error to produce the original notice, and that the copy, therefore, was secondary evidence. We do not find it necessary to consider this objection. It appears in the body of the affidavit that the affiant deposed to the fact that before the commencement of the action he made personal demand upon the plaintiff in error "for the payment of said assessment," and that the plaintiff in error admitted having received the notice and having knowledge thereof and of said demand. We think this was sufficient notice to and demand of the defendant in error, and that the admission of the exhibit, if it was error, was harmless.

It is contended that it affirmatively appears from the evidence that the receiver had no authority from the Comptroller of the Treasury to bring the present action. It is not denied that the record shows that there was originally authority to commence such an action, but it is contended that inasmuch as authority was given subsequently to compromise the demand or to sell the same,
98 it operated to retract the authority to sue. We think this assignment of error requires no extended discussion. The authority to bring the action was in no way curtailed or withdrawn by the authority to compromise or to sell the cause of action. The latter authority so given was a general power "to compromise and compound or sell at private sale all of the assets of said bank," including "claims due upon assessment of the capital stock." It was an authority entirely consistent with the specific authority pre-

viously given to bring suit. The receiver had the power to take either course so permitted by the comptroller.

It is contended, further, that the present action is barred by a second action which was brought for the purpose of enforcing the compromise which had been agreed upon between the receiver and the plaintiff in error at the time of the dismissal of the first action. It had been agreed as a compromise of said demand for said assessment that the plaintiff in error would convey to the receiver certain lots in South Bend, Washington, as a payment of the sum of $415.83, $215.83 whereof was to pay an account due to the bank from one Morgan, and the remaining $200 was to be credited to the plaintiff in error on the said assessment, and that thereafter the plaintiff in error would pay the remainder of his assessment in certain installments, all of which were to fall due within a year from the date of the compromise. It appeared that this agreement was not carried out by the plaintiff in error, except that he conveyed the lots to the receiver and received the stipulated credit therefor. In order to enforce the compromise the receiver brought the action upon the agreement, but before proceeding to judgment he took a voluntary nonsuit, which he had the right to do. We cannot see how that proceeding affects his power to prosecute the present action. The plaintiff in error failed to carry out his part of the agreement. The receiver has in the present action credited him with the $200
99 so paid on account. We find no error in the ruling of the trial court in denying to this agreement of compromise the effect of a bar to the present action.

Equally without merit is the contention that the court erred in denying the motion of plaintiff in error for a judgment at the close of the trial, upon the ground that by instituting proceedings in the second action to enforce the compromise the receiver had elected that remedy and had thereby waived his right to pursue another. There is no question here of the right of election. Election refers to a choice between different forms of action based upon the same facts. These two actions relate to different states of fact. The former was brought to enforce an agreement of compromise. The receiver took a nonsuit therein, possibly for the reason that, as the answer of the plaintiff in error in the present action alleges, the compromise agreement had never been authorized or ratified by the comptroller. But whatever may have been the reason, the receiver had the right to regard the compromise as abandoned, and to sue upon the assessment. He chose that course. He was not estopped to do so by reason of having instituted an action upon the compromise agreement.

It is contended that the liability of the plaintiff in error upon the assessment was satisfied by the payment of the $200 and the conveyance of the lots; that in taking the $200 the receiver became trustee for the plaintiff in error to secure the ratification of the proposal then submitted. This contention cannot be sustained. It is only necessary to advert to the fact already alluded to, that the plaintiff in error failed to carry out his agreement of compromise,

and that the receiver applied the $200, which had been paid him, on the assessment, and in the judgment gave the plaintiff in error credit therefor. It is argued in this connection that the lots
100 were of much greater value than $415.83 and that the receiver still retains the title to the lots. It must not be forgotten, however, that the lots were turned over at an agreed price, and that they were conveyed for a double purpose, first, to pay the debt of $215.83 owing by Morgan to the bank, and second, to pay $200 upon the assessment owing from the plaintiff in error.

We find no error in the record for which the judgment should be reversed. The judgment is affirmed.

(Endorsed:) Opinion. Filed Nov'r 10, 1902. F. D. Monckton, clerk.

101 United States Circuit Court of Appeals for the Ninth Circuit.

ADOLPHUS F. McCLAINE, Plaintiff in Error,
vs.
GEORGE C. RANKIN, as Successor to and Substituted for J. Frank Aldrich, Receiver of the First National Bank of South Bend, Defendant in Error. } No. 793. Judgment.

In error to the circuit court of the United States for the district of Washington, western division.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the district of Washington, western division, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said circuit court in this cause be, and the same is hereby, affirmed, with costs.

(Endorsed:) Judgment. Filed and entered Nov. 10, 1902. F. D. Monckton, clerk.

102 At a stated term, to wit: the October term A. D. 1902 of the United States circuit court of appeals for the ninth circuit, held at the court room, in the city and county of San Francisco, on Monday the ninth day of March in the year of our Lord one thousand, nine hundred and three.

Present: The Honorable William B. Gilbert, circuit judge, Honorable Erskine M. Ross, circuit judge, Honorable William W. Morrow, circuit judge.

ADOLPHUS F. McCLAINE, Plaintiff in Error,
v.
GEORGE C. RANKIN, Successor to and Substituted for J. Frank Aldrich, as Receiver of the First National Bank of South Bend, Defendant in Error. } No. 793.

Order Denying Petition for a Rehearing.

Ordered, petition for a rehearing, hereto filed herein, denied.

103 In the Supreme Court of the United States.

ADOLPHUS F. McCLAINE, Plaintiff in Error,
vs.
GEORGE C. RANKINS, as Receiver of the First National Bank of South Bend, Washington, Defendant in Error. } Petition for Writ of Error.

To the honorable the Supreme Court of the United States:

Now comes Adolphus F. McClaine, plaintiff in error, in the above entitled cause and represents and alleges that on the 10th day of November, 1903, the circuit court of appeals for the ninth circuit made and entered a judgment in the above entitled cause in favor of George C. Rankin as receiver of the First National Bank of South Bend, Washington, defendant in error, and against Adolphus F. McClaine, plaintiff in error for the affirmance of the judgment of the United States circuit court for the district of Washington, western division, in said cause, and your petitioner further represents and alleges that there is manifest error in the record and proceedings in said circuit court of appeals in the following particulars, to wit:—

1.

That by the record aforesaid it appears that the demurrer of the plaintiff in error to the complaint of the defendant in error was overruled by the United States circuit court for the district of Washington, western division, and that its judgment in overruling said demurrer was affirmed by said circuit court of appeals whereas the said demurrer should have been sustained, and the said judgment
104 of said circuit court should have been reversed by said circuit court of appeals for error in overruling said demurrer.

2.

That by the record aforesaid it appears that the demurrer of the defendant in error to the first affirmative defense set forth in the amended answer of the plaintiff in error was sustained by the United States circuit court for the district of Washington, western division,

and that its judgment in overruling said demurrer was affirmed by said circuit court of appeals whereas the said demurrer should have been overruled and the said judgment of said circuit court should have been reversed by said circuit court of appeals for error in sustaining said demurrer.

3.

That by the record aforesaid it appears that the United States circuit court for the district of Washington, western division, sustained the motion of defendant in error to strike paragraphs six, eight, nine, ten and eleven of the second affirmative defense contained in the amended answer of plaintiff in error to the complaint of the defendant in error, and that its judgment in sustaining said motion was affirmed by said circuit court of appeals whereas said motion should have been denied and said judgment of said circuit court should have been reversed by said circuit court of appeals for error in sustaining said motion.

4.

That by the record aforesaid it appears that on the trial of said cause in the United States circuit court for the district of Washington, western division, said circuit court admitted in evidence over the objection of plaintiff in error a certain affidavit of one Joseph G. Heim together with a stipulation appended thereto which was
105 marked "Plaintiff's Exhibit B" whereas the objection of plaintiff in error should have been sustained by said circuit court and the said circuit court of appeals should have reversed the said judgment of said circuit court because of error in admission of said evidence.

5.

That by the record aforesaid it appears that on the trial of said action in the United States circuit court for the district of Washington, western division that the motion of plaintiff in error for a nonsuit was denied by said circuit court and the judgment in denying said motion was affirmed by said circuit court of appeals whereas said circuit court should have granted said motion, and said circuit court of appeals should have reversed the said judgment of said circuit court for error in denying said motion.

6.

That by the record aforesaid it appears that upon the trial of said cause in the United States circuit court for the district of Washington, western division, said circuit court sustained the objection of defendant in error to the admission in evidence of certain documents marked "Defendant's Identification No. 1" and "Defendant's Identification No. 2" and its judgment in sustaining said objection was affirmed by said circuit court of appeals whereas said circuit court should have overruled said objections and the said circuit

court of appeals should have reversed the said judgment of said circuit court for error in sustaining said objection.

7.

That by the record aforesaid it appears that on the trial of said cause in the United States circuit court for the district of Washington, western division, that said circuit court denied the motion
106 of plaintiff in error for judgment and directed judgment to be entered in favor of defendant in error and that the said circuit court of appeals affirmed the judgment of said circuit court in denying said motion and directing judgment to be entered in favor of defendant in error whereas the said circuit court should have granted the motion of plaintiff in error, and said circuit court of appeals should have reversed said judgment of said court for error in denying said motion for judgment and in directing judgment to be entered in favor of the defendant in error.

8.

That by the record aforesaid it appears that the United States circuit court for the district of Washington, western division, entered certain findings of fact and conclusions of law offered by the defendant in error, and refused to enter certain other findings of fact and conclusions of law offered by the plaintiff in error, and that said circuit court of appeals affirmed the judgment of said circuit court in entering said findings of fact and conclusions of law offered by the defendant in error, and refusing to enter findings of fact and conclusions of law offered by plaintiff in error whereas the said circuit court should have refused the findings of fact and conclusions of law offered by defendant in error and should have entered the findings of fact and conclusions of law offered by plaintiff in error, and said circuit court of appeals should have reversed said judgment of said court for error in entering findings of fact and conclusions of law offered by the defendant in error and in refusing to enter the findings of fact and conclusions of law of plaintiff in error.

9.

That by the record aforesaid it appears that the United States circuit court for the district of Washington, western division,
107 made and entered judgment in said cause in favor of defendant in error and against plaintiff in error in the sum of $3183.17 and, that the said circuit court of appeals affirmed the said judgment of said circuit court whereas the said circuit court should have made and entered judgment in favor of plaintiff in error and against defendant in error dismissing said action and for costs, and said circuit court of appeals should have reversed said judgment of said circuit court all of which error will more fully appear by the assignment of errors in the Supreme Court of the United States which is filed herewith.

Wherefore your petitioner prays that a writ of error may be allowed to the said circuit court of appeals for the ninth circuit whereby the said final judgment may be removed to the Supreme Court of the United States to be there reviewed and corrected, and that a citation may be issued to said George C. Rankin, as receiver of the First National Bank of South Bend, Washington, citing and admonishing him to be and appear at a Supreme Court of the United States next to be holden at the city of Washington there to show cause if any there be why the said judgment of said circuit court of appeals should not be corrected, and that the amount of the bond may be fixed which it will be necessary for your petitioner to give in order the execution may be stayed upon the said final judgment, and that such other process may be allowed as may enable your petitioner to obtain a review of the said final judgment of said circuit court of appeals and the correction of the said alleged errors by the Supreme Court of the United States.

T. O. ABBOTT,
Attorney for Petitioner.

(Endorsed:) Petition for writ of error. Filed April 15, 1903. F. D. Monckton, clerk U. S. circuit court of appeals for the ninth circuit.

108 In the Supreme Court of the United States.

ADOLPHUS F. MCCLAINE, Plaintiff in Error,
vs.
GEORGE C. RANKIN, as Receiver of the First National Bank of South Bend, Washington, Defendant in Error.
} Assignments of Error.

Now comes Adolphus F. McClaine, plaintiff in error, who was also plaintiff in error in the United States circuit court of appeals for the ninth circuit, and makes the following assignment of errors in the Supreme Court of the United States in the above entitled cause which is hereby removed from said circuit court of appeals by writ of error, and the plaintiff alleges that there is manifest error in the record and proceedings of said circuit court of appeals in the following particulars, to wit:—

1.

That by the record aforesaid it appears that the demurrer of the plaintiff in error to the complaint of the defendant in error was overruled by the United States circuit court for the district of Washington, western division, and that its judgment in overruling said demurrer was affirmed by said circuit court of appeals whereas the said demurrer should have been sustained, and the said judgment of said circuit court should have been reversed by said circuit court of appeals for error in overruling said demurrer.

2.

That by the record aforesaid it appears that the demurrer of the defendant in error to the first affirmative defense set forth in the amended answer of the plaintiff in error was sustained by
109 the United States circuit court for the district of Washington, western division, and that its judgment in overruling said demurrer was affirmed by said circuit court of appeals whereas the said demurrer should have been overruled and the said judgment of said circuit court should have been reversed by said circuit court of appeals for error in sustaining said demurrer.

3.

That by the record aforesaid it appears that the United States circuit court for the district of Washington, western division, sustained the motion of defendant in error to strike paragraphs, six, eight, nine, ten and eleven of the second affirmative defense contained in the amended answer of plaintiff in error to the complaint of the defendant in error, and that its judgment in sustaining said motion was affirmed by said circuit court of appeals whereas said motion should have been denied and said judgment of said circuit court should have been reversed by said circuit court of appeals for error in sustaining said motion.

4.

That by the record aforesaid it appears that on the trial of said cause in the United States circuit court for the district of Washington, western division, said circuit court admitted in evidence over the objection of plaintiff in error a certain affidavit of one Joseph G. Heim together with a stipulation appended thereto which was marked "Plaintiff's' Exhibit B" whereas the objection of plaintiff in error should have been sustained by said circuit court, and the said circuit court of appeals should have reversed the said judgment of said circuit court because of error in admission of said evidence.

110 5.

That by the record aforesaid it appears that on the trial of said action in the United States circuit court for the district of Washington, western division that the motion of plaintiff in error for a nonsuit was denied by said circuit court and the judgment in denying said motion was affirmed by said circuit court of appeals whereas said circuit court should have granted said motion, and said circuit court of appeals should have reversed the said judgment of said circuit court for error in denying said motion.

6.

That by the record aforesaid it appears that upon the trial of said cause in the United States circuit court for the district of Washing-

ton, western division, said circuit court sustained the objection of defendant in error to the admission in evidence of certain documents marked "Defendant's Identification No. 1" and "Defendant's Identification No. 2" and its judgment in sustaining said objection was affirmed by said circuit court of appeals whereas said circuit court should have overruled said objections and the said circuit court of appeals should have reversed the said judgment of said circuit court for error in sustaining said objection.

7.

That by the record aforesaid it appears that on the trial of said cause in the United States circuit court for the district of Washington, western division, that said circuit court denied the motion of plaintiff in error for judgment and directed judgment to be entered in favor of defendant in error and that the said circuit court of appeals affirmed the judgment of said circuit court in denying said motion and directing judgment to be entered in favor of defendant in error whereas the said circuit court should have granted
111 the motion of plaintiff in error, and said circuit court of appeals should have reversed said judgment of said court for error in denying said motion for judgment and in directing judgment to be entered in favor of defendant in error.

8.

That by the record aforesaid it appears that the United States circuit court for the district of Washington, western division, entered certain findings of fact and conclusions of law offered by the defendant in error, and refused to enter certain other findings of fact and conclusions of law offered by the plaintiff in error, and that said circuit court of appeals affirmed the judgment of said circuit court in entering said findings of fact and conclusions of law offered by the defendant in error, and in refusing to enter findings of fact and conclusions of law offered by plaintiff in error whereas the said circuit court should have refused the findings of fact and conclusions of law offered by defendant in error and should have entered the findings of fact and conclusions of law offered by plaintiff in error, and said circuit court of appeals should have reversed said judgment of said court for error in entering findings of fact and conclusions of law offered by the defendant in error and in refusing to enter the findings of fact and conclusions of law of plaintiff in error.

9.

That by the record aforesaid it appears that the United States circuit court for the district of Washington, western division, made and entered judgment in said cause in favor of defendant in error and against plaintiff in error in the sum of $3183.17, and that the said circuit court of appeals affirmed the said judgment of said

circuit court whereas the said circuit court should have made
112 and entered judgment in favor of plaintiff in error and against defendant in error dismissing said action and for costs, and said circuit court of appeals should have reversed said judgment of said circuit court.

Wherefore the said plaintiff in error prays that the judgment of the said United States circuit court for the district of Washington, western division, and the judgment of said circuit court of appeals affirming said judgment be reversed and that said cause be remanded to said circuit court for a new trial.

T. O. ABBOTT,
Attorney for Plaintiff in Error.

(Endorsed:) Assignment of errors. Filed April 15, 1903, F. D. Monckton, clerk U. S. circuit court of appeals for the ninth circuit.

113 Know all men by these presents, that we, Adolphus F. McClaine, as principal and Alfred Coolidge and Emma Coolidge, his wife, as sureties, are held and firmly bound unto George C. Rankin as receiver of the First National Bank of South Bend, Washington, in the full and just sum of five thousand dollars ($5000.00) to be paid to the said George C. Rankin as receiver of the First National Bank of South Bend, Washington, his successors or assigns to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 29th day of April, in the year of our Lord one thousand nine hundred and three.

Whereas, lately at a United States circuit court of appeals for the ninth circuit, in a suit pending in said court, between said Adolphus F. McClaine as plaintiff in error, and said George C. Rankin as receiver of the First National Bank of South Bend, Washington, as defendant in error, a judgment was rendered against said Adolphus F. McClaine affirming a judgment of the United States circuit court for the district of Washington, western division, in favor of one J. Frank Aldrich the predecessor in office of said George C. Rankin as receiver of the First National Bank of South Bend, Washington, and against said Adolphus F. McClaine for the sum of thirty-one hundred and eighty-three and 47/100 dollars ($3183.47) and costs taxed at twenty-two and 40/100 dollars ($22.40), and the said Adolphus F. McClaine having obtained from the Supreme Court of the United States a writ of error to reverse the judgment in the aforesaid suit, and a citation directed to the said George C. Rankin as receiver of the First National Bank of South Bend, Washington, to be and appear at a Supreme Court of the United States to be holden at Washington within sixty days from the date of said writ.

114 Now, the condition of the above obligation is such, that if the said Adolphus F. McClaine shall prosecute his said writ of error to effect, and answer all damages and costs if he fail to

make his plea good, then the above obligation to be void, else to remain in full force and virtue.

A. F. McCLAINE. [SEAL.]
ALFRED COOLIDGE. [SEAL.]
EMMA COOLIDGE. [SEAL.]

Acknowledged before me this 29th day of April, 1903.
W. L. CLIFFORD,
[SEAL.] *Commissioner U. S. Circuit Court, District of Washington.*

UNITED STATES OF AMERICA, } ss:
Ninth Circuit, District of Washington, }

Alfred Coolidge and Emma Coolidge, being duly sworn each for himself, deposes and says, that he is a householder in said district, and is worth the sum of five thousand dollars ($5000.00) exclusive of property exempt from execution, and over and above all debts and liabilities.

ALFRED COOLIDGE.
EMMA COOLIDGE.

Subscribed and sworn to before me this 30th day of April, A. D. 1903.
JAMES S. ADAMS,
[SEAL.] *Notary Public, Residing at Calfa, County of Whitman, State of Washington.*

(Endorsed:) Bond on writ of error. Form of bond and sufficiency of securities approved, Wm. B. Gilbert, judge. Filed May 5, 1903, F. D. Monckton, clerk.

115 United States Circuit Court of Appeals for the Ninth Circuit.

ADOLPHUS F. McCLAINE, Plaintiff in Error,
v.
GEORGE C. RANKIN, Successor to and Substituted for J. Frank Aldrich, as Receiver of the First National Bank of South Bend, Washington, Defendant in Error. } No. 793.

Certificate of Clerk United States Circuit Court of Appeals to Transcript of Record.

I, Frank D. Monckton, clerk of the United States circuit court of appeals for the ninth circuit, do hereby certify the foregoing one hundred and fourteen (114) pages, numbered from one (1) to one hundred and fourteen (114), inclusive, to be a true copy of portions of the record, the opinion of the court, the assignment of errors, and of proceedings in the above-entitled case, as ordered by counsel for the plaintiff in error, and as the same appear of record in my office,

and that the same, together, constitute the transcript of record herein upon return to the annexed writ of error, as so ordered.

Seal United States Circuit Court of Appeals, Ninth Circuit.

Attest my hand and the seal of the United States circuit court of appeals for the ninth circuit, at San Francisco, California, this 19th day of May, A. D. 1903.

F. D. MONCKTON, *Clerk.*

116 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable judges of the United States circuit court of appeals for the ninth circuit, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said court, before you, or some of you, between Adolphus F. McClaine, plaintiff in error, and George C. Rankin as receiver of the First National Bank of South Bend, Washington, defendant in error, a manifest error hath happened, to the great damage of the said Adolphus F. McClaine, plaintiff in error as by his complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same to the Supreme Court of the United States, together with this writ, so that you have the same at Washington within sixty days from the date hereof in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Seal United States Circuit Court of Appeals, Ninth Circuit.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, the 15th day of April, in the year of our Lord one thousand nine hundred and three.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

Allowed by—
WM. B. GILBERT,
U. S. Circuit Judge.

117 [Endorsed:] No. 793. Supreme Court of the United States. Adolphus F. McClaine, plaintiff in error, *vs.* George C. Rankin as receiver of the First National Bank of South Bend, Washington, defendant in error. Writ of error. Filed April 28, 1903. F. D. Monckton, clerk U. S. circuit court of appeals for the ninth circuit.

Return to Writ of Error.

The answer of the judges of the United States circuit court of appeals for the ninth circuit.

As within we are commanded, we certify under the seal of our said circuit court of appeals, in a certain schedule to this writ annexed the record and proceedings of the plaint whereof mention is within made, with certain things touching the same, to the Supreme Court of the United States, within mentioned, at the day and place within contained.

We further certify that a copy of this writ has been duly lodged for the within named defendant in error.

By the court:

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON, *Clerk.*

118 UNITED STATES OF AMERICA, *ss:*

The President of the United States to George C. Rankin, as receiver of the First National Bank of South Bend, Washington, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington, within sixty days from the date hereof, pursuant to a writ of error duly issued and now on file in the clerk's office of the United States circuit court of appeals for the ninth circuit, wherein Adolphus F. McClaine is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Wm. B. Gilbert judge of the United States circuit court of appeals for the ninth circuit this 21st day of April A. D. 1903.

WM. B. GILBERT.

Service of above hereby accepted & formal service waived this the 22nd day of April 1903.

HUDSON & HOLT,
Att'ys for Def't in Error.

119 [Endorsed:] No. 793. Supreme Court of the United States. Adolphus F. McClaine, plaintiff in error, *vs.* George C. Rankin as receiver of the First National Bank of South Bend, Washington, defendant in error. Citation. Filed April 28, 1903. F. D. Monckton, clerk U. S. circuit court of appeals for the ninth circuit.

Endorsed on cover: File No. 18,972. U. S. C. C. of appeals, 9th circuit. Term No. 321. Adolphus F. McClaine, plaintiff in error, *vs.* George C. Rankin, as receiver of the 1st National Bank of South Bend, Washington. Filed June 16", 1903.